82-486

No.

Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO) ET AL.,
Petitioners,

v.

PAUL E. SCOTT, ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

MARTIN W. DIES
P.O. Box 490
Orange, Texas 77360
Attorneys for Petitioners

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037
Of Counsel

TABLE OF CONTENTS

		Page
Appendix A	(Opinion of the United States Court of Appeals for the Fifth Circuit en banc) (July 1, 1982)	A1
Appendix B	(Opinion of the United States Court of Appeals for the Fifth Circuit panel) (March 26, 1981)	B1
Appendix C	(Opinion of the United States District Court for the Eastern District of Texas, Beaumont Division) (November 16, 1978)	C1
Appendix D	(Judgment United States District Court for the Eastern District of Texas, Beaumont Division) (December 19, 1978)	D1
Appendix E	(Judgment of the United States Court of Appeals for the Fifth Circuit) (July 1, 1982)	E1

APPENDIX A

FORMER FIFTH

Paul E. SCOTT, et al., Plaintiffs-Appellees,

v.

Bill MOORE, et al., Defendants,

Laborers International Union of North America, Local No. 870, et al., Defendants-Appellants,

International Union of Operating Engineers, etc., AFL-CIO, Local 450, Defendant-Appellant.

No. 79-1196.

United States Court of Appeals, Fifth Circuit.*

July 1, 1982.

Construction company and two of its employees brought action against trades council, its unions, and individual union members, alleging that defendants conspired for purpose of depriving plaintiffs of the equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on construction site. The United States District Court for the Eastern District of Texas, 461 F.Supp. 224, Joe J. Fisher, J., entered judgment in favor of plaintiff, and certain defendants appealed. The Court of Appeals, 640 F.2d 708, affirmed in part and reversed in part. After rehearing en banc, the Court of Appeals, Charles Clark, Circuit Judge, held that: (1) civil rights conspiracy statute encompassed conspiracy designed to deprive nonunion workers and their employer of First Amendment right of free association where conspiracy, which was motivated by defendants' hostility toward nonunion workers and employers who hired them, was furthered by physical assaults and beatings and destruction of property, and (2) findings that certain unions authorized or participated in conspiracy aimed at intimidating and coercing nonunion workers from working or being employed within a "union area" were not clearly erroneous; however, evidence of participation in the conspiracy was insufficient to warrant judgment against the remaining eight unions.

Affirmed in part and reversed in part.

Alvin B. Rubin and Jerre S. Williams, Circuit Judges, filed dissenting opinion in which Brown, Vance, Kravitch, Randall, Tate, and Sam D. Johnson, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, filed dissenting opinion.

Garwood, Circuit Judge, filed dissenting opinion.

1. Labor Relations ⇐870

Norris-LaGuardia Act did not deprive district court of jurisdiction to enjoin labor organizations not to combine, conspire, threaten, intimidate, assault or commit any act of violence toward or upon any person, property or possession of any person or his family who worked upon, traveled to, or delivered materials, goods, or services to construction company or to construction site. Norris-LaGuardia Act § 5, 29 U.S.C.A. § 105.

2. Labor Relations ⇐855

Norris-LaGuardia Act's prohibition against federal injunctive relief merely re-

* Former Fifth Circuit case, section 9(1) of Public Law 96-452—October 14, 1980.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1982, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

stricts court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is legitimate activity of a labor union. Norris-LaGuardia Act, §§ 4, 5, 29 U.S.C.A. §§ 104, 105.

3. Conspiracy ⇐7.6

Civil rights conspiracy statute encompassed conspiracy designed to deprive nonunion workers and their employer of First Amendment right of free association where conspiracy, which was motivated by defendants' hostility toward nonunion workers and employers who hired them, was furthered by physical assaults and beatings and destruction of property. U.S.C.A.Const. Amends. 1, 14; 42 U.S.C.A. § 1985(3).

4. Constitutional Law ⇐274.1(1)

Guaranties afforded by First Amendment are protected by due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14.

5. Constitutional Law ⇐91

Right of free association is closely aligned with right of free speech and is protected by First Amendment. U.S.C.A. Const.Amend. 1.

6. Conspiracy ⇐7.6

Civil rights conspiracy statute protects against private infringement on First Amendment freedoms. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. § 1985(3).

7. Conspiracy ⇐7.6

Civil rights conspiracy statute reaches all deprivations of equal protection, whatever their source. 42 U.S.C.A. § 1985(3); U.S.C.A.Const.Amend. 14.

8. Conspiracy ⇐7.5

Not every conceivable class of persons is covered by civil rights conspiracy statute; members of plaintiff class must share some common characteristic beyond simply being victims of defendant's conspiratorial conduct and class can not be so large and amorphous that its members are virtually indistinguishable from vast majority of the populace. 42 U.S.C.A. § 1985(3).

9. Conspiracy ⇐7.5

Plaintiffs, nonunion employer and its nonunion employees who alleged injury resulting from conspiracy motivated by defendants' hostility toward nonunion workers and employers who hired them, constituted a class for purposes of civil rights conspiracy statute. 42 U.S.C.A. § 1985(3); National Labor Relations Act, §§ 7, 8, 8(b)(1) as amended 29 U.S.C.A. §§ 157, 158, 158(b)(1).

10. Conspiracy ⇐7.5

Civil rights conspiracy statute cannot be invoked to disrupt operation of a carefully integrated statutory scheme. 42 U.S. C.A. § 1985(3).

11. Conspiracy ⇐7.5

Cause of action under civil rights conspiracy statute cannot be predicated upon an unfair labor practice, without more. 42 U.S.C.A. § 1985(3).

12. Conspiracy ⇐7.5

Neither unionism nor nonunionism suffices to create a covered class for purposes of civil rights conspiracy statute; however, where there is no campaign to organize employees and force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer to freely associate with one another, an

action under civil rights conspiracy statute will lie. 42 U.S.C.A. § 1985(3).

13. Commerce ⇐74.65

Commerce clause justified application of civil rights conspiracy statute to defendants' wholly private conspiracy, which was motivated by hostility against nonunion employees and their employer which employer was general contractor which, during year preceding violent attack on its construction site had performed work outside of Texas valued in excess of $300,000, where employer had purchased over $50,000 worth of goods, and materials which originated outside of Texas and where construction contract was with United States Army Corps of Engineers, even though volume of business done outside Texas was small compared to total amount of services and goods in interstate commerce. 42 U.S.C.A. § 1985(3); U.S.C.A.Const.Art. 1, § 8, cl. 3.

14. Commerce ⇐7(2)

Grant of power under commerce clause extends to those activities intrastate which so affect interstate commerce, or exertion of the power over it, as to make regulation of them appropriate means to attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. U.S.C.A.Const.Art. 1, § 8, cl. 3.

15. Labor Relations ⇐766

While Norris-LaGuardia Act requires clear and convincing evidence as to union authorization, participation in, or ratification of the act allegedly performed by its members in order to pose liability for it, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

16. Labor Relations ⇐766

Where a labor organization purposefully adopts violence as its course and where that violence is not associated with or happening to result from any ongoing legitimate union conduct, union is not participating in a labor dispute within meaning of Norris-LaGuardia Act. Norris-LaGuardia Act, § 13(c), 29 U.S.C.A. § 113(c).

17. Labor Relations ⇐766

Violence at construction site, which was conceived in reprisal for refusal of employer and his workers to accede to demands that construction project be conducted as a union job, did not occur in conjunction with the labor dispute within meaning of Norris-LaGuardia Act; thus, section of Act requiring clear, unequivocal and convincing proof of union involvement in unlawful conduct in order to impose liability for it was not applicable suit brought by employer and his workers against trades council, its unions, and individual union members. Norris-LaGuardia Act, §§ 6, 13(c), 29 U.S.C.A. §§ 106, 113(c).

18. Labor Relations ⇐766

A labor dispute exists for purposes of Norris-LaGuardia Act where unlawful conduct occurs in conjunction with some legitimate union activity and a labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. Norris-LaGuardia Act, § 13(c), 29 U.S.C.A. § 113(c).

19. Federal Courts ⇐853

A finding is "clearly erroneous" when although there is evidence to support it, reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

20. Federal Courts ⇐848

Appellate court must be especially reluctant to disregard a factual finding based upon evaluation of testimony that draws credibility into question and it may not consider the evidence anew and merely because it might have reached a different result on same evidence will not justify its setting the district court's findings aside. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

21. Conspiracy ⇐19

Federal Courts ⇐865

Findings that certain unions authorized or participated in conspiracy aimed at intimidating and coercing nonunion workers from working or being employed within a "union area" were not clearly erroneous; however, evidence of participation in the conspiracy was insufficient to warrant judgment against the remaining eight unions. 42 U.S.C.A. § 1985(3).

Appeals from the United States District Court for the Eastern District of Texas.

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between section 1985(3) and the labor relations laws. The district court, 461 F.Supp. 224, issued a permanent injunction against the defendants, including numerous labor organizations. It also awarded money damages for violations of section 1985(3), concluding that the statute afforded a remedy for the kind of private conspiracy involved here and that Congress was constitutionally empowered to provide such a remedy. A panel of this court affirmed in part and reversed in part. 5th Cir., 640 F.2d 708. After rehearing, the court en banc affirms the district court in part and reverses in part.

I. THE FACTUAL BACKGROUND

This case arises out of an episode of mob violence that occurred in the early morning hours of January 17, 1975. The plaintiffs are A.A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions. The individual defendants are not parties to this appeal. The plaintiffs contend that the defendants conspired for the purpose of depriving them of the equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on the Cross construction site, assaulting workers and destroying property.

A.A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted

with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur. The agreement had a contract price in excess of $8 million and called for the construction of the pump station with four pumps and a gravity drain for flood control. In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

Cross Construction Company's hiring practices provoked an antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he would "hurt you bad," saying, "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local # 610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."

Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.

There is no direct evidence to show the organizing force behind this protest demonstration, but on Wednesday, January 15, two days before the assault on the Cross jobsite, the Sabine Area Building Trades Council held its regular weekly meeting. Cross Construction Company's indifference to prospective employees' union status and its lack of a union contract had long been topics of concern at the Council's meetings, and they were once again discussed during the January 15 session. In addition, the group discussed the rumored citizens protest, and some of the union representatives in attendance informed the Council that the demonstration had apparently been scheduled for the following Friday.

On Thursday, the sixteenth, Cross Construction Company learned of the scheduled protest from two union employees associated with the Alligator Bayou project. Fred Dukes, a member of Cement Masons Local 884, worked for Cross as a cement finisher on a two-day job. Earl Stevens, a member of Plumbers Local 504, worked as a foreman for Cross Construction Company's mechanical subcontractor. Both men received warnings from their respective union business agents about a possible picket or dem-

onstration to be held at the Cross construction site, and both men passed that information along to Cross. Neither Dukes nor Stevens had heard anything about violent or destructive conduct. Nevertheless, Cross directed its employees to report for work at 6:00 a. m. on Friday, an hour earlier than usual, in order to avoid any confrontation between them and the demonstrators.

On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. Several vehicles made brief forays up the access road, and their occupants confirmed with Cross and Scott that they were at the Cross Construction Company jobsite. The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment. The entire episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. They sought and obtained a temporary injunction restraining the then-named defendants and "all persons, firms, and associations combining or conspiring with defendants" from further violent, intimidating, or destructive acts against employees at the Alligator Bayou Pump Station project. Nearly two years later, the plaintiffs amended their complaint, adding A.A. Cross Construction Company, Inc., as plaintiff and the Sabine Area Building and Construction Trades Council along with twenty-five local unions as defendants. The district court found that the plaintiffs had proved a conspiracy to deprive them of the equal protection of the laws, permanently enjoined the building trades council and twenty-four of the unions from future misconduct, and assessed damages against eleven of the union defendants.[1]

1. The district court assessed damages against the following eleven unions: Laborers International Union of North America, Local 870; Operative Plasters and Cement Masons International Association, Local 884; United Association of Journeymen and Apprentices of the

II. THE JURISDICTIONAL QUESTION: INJUNCTIVE RELIEF AND THE NORRIS–LAGUARDIA ACT

[1] The district court issued a permanent injunction against the Sabine Area Building and Construction Trades Council, twenty-four of its member unions, and all persons conspiring with them. The court's injunction ordered that those parties subject to its terms

> . . . shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A.A. Cross Construction Co., Inc., or to the site of the Alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

The defendants contest the district court's power to issue such an injunction, arguing that the Norris-LaGuardia Act deprives the district court of jurisdiction to enjoin labor organizations from engaging in conspiratorial conduct. They maintain that the unembellished language of the Act is sufficient to show the court's usurpation of authority.

We disagree. The Norris-LaGuardia Act was passed for the purpose of limiting the circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute. The labor injunction had been an important device used by employers to counter organized labor's most effective economic weapons, strikes, boycotts, and picket lines. However, the Act was predicated on the conviction that labor disputes turned on issues of social and economic policy that could not appropriately be resolved by the courts. The legislative solution to the problems confronting workers in a complex industrial economy was union organization and collective bargaining. Since the ready issuance of labor injunctions presented a serious obstacle to the concerted activities of organized workers, Congress decided to remove the federal judiciary from labor disputes. Thus, section 5 of the Act, 29 U.S.C. § 105, limits the equitable power of the federal courts in the following way:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 105.

[2] But the Act does not impose an unqualified prohibition against federal injunctive relief. Section 105 merely restricts the court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is an act enumerated in section

Plumbing and Pipefitting Industry of the United States and Canada, Local 195; United Brotherhood of Carpenters and Joiners of America, Local 610; United Brotherhood of Carpenters and Joiners of America, Local 753; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO, Local 587; International Association of Bridge Structural and Ornamental Ironworkers, Local 125; Sheet Metal Workers International Association, Local 196; Carpenters District Council of Sabine Area; International Brotherhood of Electrical Workers, Local 479; and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL–CIO, Local 450.

104.[2] The enumerated acts include refusing to work, joining a labor organization, paying or withholding strike benefits from a labor disputant, *lawfully* giving aid to a labor disputant who is prosecuting or defending a court action, truthfully and peacefully publicizing a labor dispute, peaceably assembling to promote one's interests in a labor dispute, and agreeing with or inducing other persons to do any of those acts. In short, section 104 interdicts injunctive relief against legitimate activities of labor unions. Nothing in this provision, however, denies to federal courts the power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons seeking to forward or interested in some labor-related objective.

In fact, the Norris-LaGuardia Act itself recognizes by negation the threatened commission of violent acts as a condition under which an injunction may issue: Section 107 states that no court of the United States has jurisdiction to grant an injunction, unless, after a hearing, the court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained . . . ." 29 U.S.C. § 107(a). Thus, violence, intimidation, threats, vandalism and combinations or conspiracies to commit such acts may be restrained and enjoined even though they arise in connection with a labor dispute. *See, e.g., Westinghouse Broadcasting Co. v. Dukakis*, 412 F.Supp. 580 (D.Mass.1976); *Potomac Electric Power Co. v. Congress of Racial Equality*, 209 F.Supp. 559 (D.D.C. 1962). The Norris-LaGuardia Act does not divest the district court of jurisdiction to enjoin the kind of violent conduct present in this case.[3]

2. Section 104 provides as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104.

3. Even where jurisdiction to grant injunctive relief is authorized, the Norris-LaGuardia Act imposes strict procedural requirements upon the court. *See* 29 U.S.C. §§ 107–109; *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561–62, 58 S.Ct. 703, 707, 82 L.Ed. 1012, 1016 (1938). Section 107 provides that no federal court shall have jurisdiction to issue a "permanent injunction in any case involving or growing out of a labor dispute" except after hearing testimony in open court and after mak-

III. THE STATUTORY QUESTION: THE SCOPE OF REMEDY UNDER 42 U.S.C. § 1985(3)

A. *Griffin v. Breckenridge*

Section 1985(3) was originally enacted by Congress as a part of the Ku Klux Klan Act in order to enforce the Civil War amendments to the Constitution and to provide a means of redress for persons victimized by the Klan's acts of terror and intimidation. The statute imposes civil liability on persons conspiring to deprive another person or class of persons of "the equal protection of the laws, or of equal privileges and immunities under the laws."[4] Narrow judicial construction made section 1985(3) a seldom-used remedy during the first century after its enactment. *See, e.g., Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). However, the Supreme Court decided in 1971 to "accord to the words of the statute their apparent meaning" and held section 1985(3) provided a civil remedy for damages against wholly private infringements of constitutionally protected rights. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1795, 29 L.Ed.2d 338, 345 (1971). In *Griffin*, a group of whites assaulted three black men along a Mississippi highway in the mistaken belief that their victims were the associates of a civil rights worker. The blacks brought an action under section 1985(3) to redress violations of the laws of the United States and of Mississippi, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons. The Supreme Court first held that the text of

ing certain findings of fact. The district court must find: i) that the danger to the complainant is imminent; ii) that the defendant's acts will result in irreparable injury; iii) that, as to each item of relief sought, the harm to the complainant if relief were denied outweighs the harm to the defendant if relief were granted; iv) that there is no adequate remedy at law; and v) that the officials charged with protecting the complainant are either unwilling or unable to do so. *See* 29 U.S.C. § 107.

The district court in the case at bar issued a permanent injunction without specifically making these five findings; however, the defendants have not objected to the district court's failure to do so. Although this court will normally not consider an issue which a party fails to raise on appeal, a federal court is under an independent obligation to determine whether it has jurisdiction to decide a claim. *See Pettinelli v. Danzig*, 644 F.2d 1160, 1161 (5th Cir. 1981). Because the findings required by section 107 are arguably a jurisdictional prerequisite to the issuance of an injunction in a labor dispute, the defendant's failure to raise this question on appeal does not dispose of the issue. We need not decide, however, whether the district court's failure to make the requisite findings deprived it of jurisdiction. Even assuming that these findings are a jurisdictional prerequisite to the issuance of an injunction, they are required only in cases "involving or growing out of a labor dispute." As we discuss below, this case does not involve a labor dispute within the meaning of the Norris-LaGuardia Act. Thus, the absence of a labor dispute renders an inquiry into the jurisdictional nature of the section 107 findings unnecessary.

4. The relevant part of section 1985(3) reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

the statute, recent judicial interpretations given to related civil rights provisions, the complementary relationship of the various civil rights statutes, and the legislative history surrounding section 1985(3) all "point unwaveringly to § 1985(3)'s coverage of private conspiracies." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.

While eliminating the state action requirement, the *Griffin* court recognized that the statute, if applied too broadly, could displace many areas of tort law that have traditionally been reserved to the states and thereby violate constitutionally based principles of federalism. "That the statute was meant to reach private action does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. The Court delineated the reach of the statute by giving full effect to a limiting amendment drafted by Congress. The Court construed the language of the amendment, which limited section 1985(3)'s application to deprivations of equal protection or equal privileges and immunities, to require that there be some "class-based, invidiously discriminatory animus behind the conspirators' action." 403 U.S. at 102, 91 S.Ct. at 1798. *Griffin* thus made clear that the limiting principle adopted by Congress is satisfied by a showing of class-based animus. The Court then noted four elements necessary for a plaintiff to establish a 1985(3) cause of action:

(1) the defendants must conspire or go in disguise on the highway or premises of another;

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and

(3) one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby

(4) another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

See id. at 102–03, 91 S.Ct. at 1790, 29 L.Ed.2d at 348. Subsequently, this court has added a fifth element,

(5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation.

See McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc).

The *Griffin* court, having concluded that the plaintiffs had stated a cause of action under section 1985(3), then sought to locate a source of congressional power to reach the private conspiracy alleged. The sources identified in *Griffin* were the Thirteenth Amendment and the constitutional right to travel. 403 U.S. at 104–06, 91 S.Ct. at 1799–1800, 29 L.Ed.2d at 349–50. The Court observed, however, that other provisions of the Constitution, including section 5 of the Fourteenth Amendment, might empower Congress to reach other conspiracies by private persons. *Id.* at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351. However, the Court found the facts of that case made it unnecessary to look beyond the Thirteenth Amendment and the right to interstate travel.

B. *The Present Case*

[3] *Griffin's* principles indicate the plaintiffs here have made out a cause of action under section 1985(3). The facts of this case clearly embody four of the five elements essential to a successful 1985(3) claim. First, the evidence is sufficient to

establish a conspiracy among some of the Council's constituent unions and individual defendants. Second, proof that plaintiffs were assaulted, beaten, and threatened and that property was destroyed establishes the requisite "act in furtherance" of the conspiracy. Third, these acts are indisputably illegal apart from § 1983(3) as required by *McLellan*. Fourth, there is evidence of personal injuries, property damage, and economic loss. The only element requiring analysis is the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws. This requirement, in turn, has two components: (1) the violation of some protected right and (2) a class-based, invidiously discriminatory animus motivating the violation.

1. *Violation of a Protected Right*

In *Griffin*, the Supreme Court stated that a 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. The plaintiffs in the case at bar contend that the object of the defendants' conspiracy was to deprive them of their First Amendment right to associate with their fellow nonunion employees. They argue that curtailment of their interests secured by the First Amendment is a deprivation of equal protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*.

[4, 5] The Ku Klux Klan Act was originally entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E.g. Williams v. Rhodes*, 393 U.S. 23, 30–31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan*, 376 U.S. 254, 276–77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 709 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798–99, 52 L.Ed.2d 261, 283 (1977); *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171–72, 2 L.Ed.2d 1488, 1499 (1958).

The defendants raise two objections to the plaintiffs' assertion of a protected right. First, they contend that section 1985(3) does not provide a remedy for private interference with First Amendment freedoms. Second, they argue that even if such a remedy does exist, the plaintiff's activities did not rise to the level of a constitutionally protected right.

[6] In arguing that section 1985(3) does not protect against private infringement on First Amendment freedoms, the defendants note the well-established principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1180 (1948). To support their construction of section 1985(3) the defendants rely upon several decisions of the Seventh Circuit. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the court held

that section 1985(3) does not afford protection against private deprivations of rights protected under the Fourteenth Amendment absent some kind of state involvement. Emphasizing the historical connection between sections 1983 and 1985(3), *Dowling* decided that it is necessary to identify the interests which Congress intended to protect from unequal treatment as well as the kinds of conduct which it meant to proscribe.

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

459 F.2d at 195 (footnotes omitted).[5] The Seventh Circuit subsequently extended the *Dowling* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedoms. *Accord Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

To explain how private conspirators could deprive a person of rights which are only protected against state interference, Justice Stevens, the author of *Dowling*, later suggested that "if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment." *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 384, 99 S.Ct. 2345, 2355, 60 L.Ed.2d 957 (1979) (Stevens, J. concurring).

Our problem with this line of analysis arises from the Supreme Court's express reasoning in *Griffin*. Because most basic constitutional provisions impose limitations on the power of government to regulate private conduct, the rights these limitations confer on individuals are typically rights against the state. The *Griffin* Court acknowledged the conceptual difficulties associated with private deprivations of constitutional rights. The Court, however, construed section 1985(3) to reach both public and private constitutional wrongs.

> A century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," *whatever their source*.

403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345 (citation omitted and some emphasis

5. *Dowling* recognizes that there is no statutory requirement of state participation or support for the conduct of the conspirators, *i.e.*, that there is no requirement that the defendants act under color of state law. However, where one suffers a deprivation of a federally created right which necessarily includes some component of state action, *Dowling* holds that such state action is also a necessary ingredient of the section 1985(3) cause of action. *See* 459 F.2d at 194–95.

supplied). The Court also said: "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.[6] These clear, decisional words in *Griffin* simply will not permit us to speculate that section 1985(3) might not afford a remedy for private conspiracies.

Griffin even considered and rejected the very explanation of section 1985(3) which was later suggested in the *Novotny* concurrence. In concluding that the first part of section 1985(3) reached all deprivations of the equal protection of the law, "whatever their source," *Griffin* considered the various forms which a state action limitation might take but rejected the idea that Congress had intended to impose any state action limitation on section 1985(3). Specifically, the Court rejected the notion that a private conspiracy had to hinder state officials in their obligation to give equal protection because it found that this type of conduct was explicitly dealt with elsewhere in the Act. *See Griffin v. Breckenridge*, 403 U.S. at 98–99, 91 S.Ct. at 1796–97.

[7] We are not unmindful of the Supreme Court's statement in *Novotny*, that section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." 442 U.S. at 372, 99 S.Ct. at 2349. We also acknowledge that some commentators have read this statement as an implicit endorsement of the Seventh Circuit's position in *Dowling*. *See* Note, *Private Conspiracies to Violate Civil Rights*, 61 B.U.L.Rev. 1007 (1981). However, so long as *Griffin* remains viable, we are bound by its determination that section 1985(3) reaches all deprivations of equal protection, whatever their source.

The second prong of defendants' argument on this point asserts that even if section 1985(3) protects first amendment rights from private infringement, the plaintiffs' actions in this case—merely working for a nonunion employer—do not qualify for constitutional protection. We disagree.

The Supreme Court has long recognized that association for the purpose of advancing economic, as well as political or religious, interests falls within the protection of the First Amendment. *See Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 8, 84 S.Ct. 1113, 1117–18, 12 L.Ed.2d 89 (1964); *Thomas v. Collins*, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945). In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court recognized that the corollary of the right to associate to advance economic interests is the right not to associate. *Abood* stated that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." 431 U.S. at 222, 97 S.Ct. at 1793. The Court reasoned that because the employees' forced support would entail the advancement of interests and ideas which they did not share, the employees' right not to associate could be infringed by union shop laws. Moreover, the Court pointed out that union shop laws had been upheld previously, not because employees lack a First Amendment right not to associate, but be-

6. Technically, of course, this language is dicta. *Griffin* grounded its decision on the rights secured to black citizens under the Thirteenth Amendment and the right to interstate travel, both of which operate as limits on individual conduct as well as state conduct. However, we believe that the language and reasoning of *Griffin* on this issue are sufficiently indicative of the Supreme Court's approach to be regarded as dispositive.

cause "such interference [with that right] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* Though it found such infringement justified, *Abood* thus recognized that requiring financial support could infringe first amendment rights.

The conspiracy in the case at bar sought to deny completely the plaintiff employees' right not to associate. The district court found that several truckloads of men assaulted the plaintiffs and "threatened to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles." The conspiracy was intended to deny the nonunion employees their right not to associate either by driving them out of the county or by coercing them to unionism through violence. The defendants sought not merely to force plaintiffs to give financial support to a union (an act which *Abood* recognized could interfere with a person's freedom not to associate), but also to force Cross's employees to become union members or leave an area which had been staked out as "union country." The purpose of the conspiracy was to deprive the plaintiffs of a protected right.[7]

2. *Discriminatory, Class-Based Animus*

While *Griffin* made clear that Congress intended to reach a denial of equal protection because of race, it left open the issue of whether section 1985(3) prohibited other class-based discrimination. *See* 403 U.S. at 102 n.9, 91 S.Ct. 1798 n.9. We find it does and that plaintiffs come within its protection.

In *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (en banc), we recently considered what other types of class-based animus section 1985(3) might reach. We found that two types of classes come within the statute's protection. First, we recognized that section 1985(3) covers classes "having common characteristics of an inherent nature"—i.e., those kinds of classes offered special protection under the equal protection clause. *Id.* at 347. We also recognized that:

> [t]he class-based animus required by the Supreme Court in *Griffin* and now reasserted by this court is not identical with the class-based distinctions required to support an action under the equal protection clause .... For example, section 1985 was certainly intended to cover conspiracies against Republicans; distinctions based on affiliation with a major political party are not among those traditionally subject to special scrutiny under the Fourteenth Amendment. What *Griffin* stands for, and what we now hold, is that Section 1985 was intended to encompass only those conspiracies motivated by animus against the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act.

Id. at 347 n.9.

Kimble is consistent with the decisions of the other circuits. Decisions which have

7. Because of our disposition of the case, it is not necessary to decide whether section 1985(3) also protects against private conspiracies to deny rights secured under state law. *See Life Insurance Company of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (holding violations of state antidiscrimination statute cognizable). It is also unnecessary to decide whether federal statutory rights are protected by § 1985(3). *See Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), *rev'd*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (violations of Title VII). *Cf. McLellan*, 545 F.2d 919 (5th Cir. 1977) (right to file bankruptcy petition not protected.)

accorded protection to nonracial classes have generally fallen into the two categories identified by *Kimble*. The first category consists of those classes afforded special protection under the equal protection clause. *See, e.g., Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1253, 71 L.Ed.2d 445 (1982) (members of Unification Church); *Life Insurance Company of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (women); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (Jews); *Baer v. Baer*, 450 F.Supp. 481 (N.D.Cal.1978) (members of the Unification Church); *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C.1973) (Children of God). The second is made up of classes whose members are discriminated against because of their political beliefs or associations. *See, e.g., Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (supporters of a particular political candidate); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of incumbent sheriff); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (worshippers at a predominantly white Catholic church disrupted by black civil rights protesters).

Plaintiffs are not a class normally afforded special protection under the equal protection clause merely because they wish to work nonunion. They are entitled to section 1985(3) protection only if they are persons within the second category of protected classes noted by *Kimble*, "the kind[ ] of class Congress was trying to protect when it enacted the Ku Klux Klan Act." 648 F.2d at 347 n.9. In considering whether plaintiffs qualify, we must from the outset be mindful that the conspiracy in this case was motivated by a prounion animus so strong that it staked its claim not merely ideologically, but geographically. The nonunion plaintiffs were repeatedly told that they were in union country and would be punished for choosing to work there nonunion.

[8] Not every conceivable class of persons is covered by section 1985(3). Members of the plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct. *See, e.g., Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976) (homeowners raided by drug enforcement agents); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975) (property owners allegedly injured by city council rezoning efforts). The class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. *See, e.g., Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978) (nonlawyers). Even some clearly defined and easily identifiable groups have been denied protected status under the statute. *See, e.g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals); *Carchman v. Korman Corp.*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979) (tenant organizers); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979) (debtors); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (persons who file voluntary bankruptcy petitions); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973) (physicians who testify in malpractice suits).

In the absence of Supreme Court guidance as to the kinds of classes protected by section 1985(3) or a method by which protected classes should be identified, we turn to our own en banc decision in *McLellan* to provide our gauge. In *McLellan*, we held that the statute does not cover persons who file voluntary petitions in bankruptcy. The decision was based on three factors. First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against them. Third, including bankrupts within the ambit of section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right. 545 F.2d at 932-33. While the presence of the first factor indicates that a particular class should come under the aegis of section 1985(3), the last two factors act more as checks on unwarranted expansion of section 1985(3). Their presence does not suggest so much that a particular class should be protected as their absence indicates that coverage would be inappropriate.

[9] Applying the *McLellan* factors to our case today, we find that the plaintiffs constitute a class for 1985(3) purposes.[8] The labor union movement in America was yet to be born when the 42d Congress was in session, so it could not have been specifically concerned with discrimination perpetrated against nonunion laborers. However, the congressional debates evince a hearty regard for persons who are victimized because of their political beliefs and associations. Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a political one. The motives and ambitions of the Klan disturbed the Republicans in the 42d Congress because they feared that its activities would defeat the policies of Reconstruction and deprive the newly emancipated blacks of rights secured to them under the recent amendments to the Constitution. Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath,

> showing that here is a political organization, with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern States from enjoying a right which has been guaranteed to them by the Constitution of our country.

Cong. Globe, 42d Cong., 1st Sess. 153 (1971). The Klan's political objective formed a recurrent theme in the Senate debates.[9]

The apprehension of Republican senators over the Klan's scheme of terrorizing citi-

8. Our reliance upon the factors deemed relevant in *McLellan* does not necessarily imply that they are the only relevant considerations. Conceivably, other factors may be regarded as sufficient to include or to exclude other classes from § 1985(3) coverage.

9. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 252 (remarks of Sen. Morton) ("[t]he purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id.* at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id.* at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

zens for their political views and of preventing voters from exercising their franchise also echoed throughout the debates conducted in the House. Representative Ellis Roberts of New York expressed this concern in the following terms:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration and the destroying angel passes by. Omit that sign and the torch may kindle the roof that covers women and children.... Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe, 42d Cong., 1st Sess. 412–13 (1871). Other Republican congressmen expressed similar views.[10] *See generally* Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U.Chi.L. Rev. 402, 407–420 (1979).

These attacks on Republicans prompted congressional concern because they were viewed as more than isolated or chance occurrences. Congress saw them as part of a pervasive campaign to prevent Republicans from establishing the policies of Reconstruction in an area of the nation—the South. *See* Avins, *The Ku Klux Klan Act of 1871*, 11 St. Louis U.L.J. 331, 376 (1967). The Congressmen consistently noted the pervasive regional hostility toward the Republicans as a reason for extending federal protection in section 1985(3). *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 333–34 (1871) (remarks of Rep. Hoar); *id.* at 412–13 (remarks of Rep. Roberts.)[11]

Although Congress did not express a specific intent to protect nonunion employees in enacting the Ku Klux Klan Act, the legislative history demonstrates that the nonunion employees in this case comprised

10. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 72 (remarks of Rep. Blair) (the Klansmen "murder for a difference in political opinions"); *id.* at 333 (remarks of Rep. Hoar) (the Klan is a "secret political conspiracy"), *id.* at 391 (remarks of Rep. Elliott) ("the design of the Ku Klux is political"); *id.* at 488 (remarks of Rep. Lansing) ("the Ku Klux in their crimes are inspired by political zeal").

11. The plaintiffs argue that Congress also intended to extend protection to workers. They note particularly Senator Freylinghausen's concern for the rights of northern laborers migrating south:

> The journeyman cobbler of New England may wrap his awl and wax and last in his leather apron and stand in Charleston, or New Orleans, or Savannah, and say "Here I will settle in despite of the constitution and of the laws of these States; and I have a right to invoke the power of the nation here to protect me." The mason or carpenter of New Jersey may put his chisels or his trowels in his carpet-bag, and go to any part of this land and say, "Here I will stay in despite of the holy horror of those who cry out," "Adventurer!" "Scalawag!" "Carpet-bagger!"

Cong. Globe, 42d Cong., 1st Sess. 500 (1871). Although this, and other remarks noted by the plaintiffs, do express Congress' intent to protect northern laborers, we discount their importance to the case at bar for two reasons. First, because these remarks occur only sporadically throughout the legislative history, they do not appear to reflect a major concern of the 42d Congress. Second, the hostility directed toward the carpetbaggers appears to have arisen because of the carpetbaggers' association with the policies of Reconstruction, not because of any economic association. Their status as workers appears to have been merely incidental to the hostility they experienced and to Congress' concern.

the kind of class Congress intended to protect. The debates over the need for protecting the Republicans in the South reveal two class characteristics which prompted Congress to extend protection in section 1985(3). First, the legislative history reflects a pervasive concern for people discriminated against because of their political associations. Second, Congress' concern was prompted by the tenuous status of Republicans in this geographic region. The Republicans' attempt to establish an extended new order had met with pervasive regional hostility. It was this regional hostility which Congress sought to counterbalance by extending federal protection in section 1985(3). Although regional hostility is not an intrinsic class characteristic, those who would exercise a false territorial sovereignty by fomenting hostility against persons antagonistic to their aims create a class in need of federal protection of precisely the sort Congress intended to protect.

In this case, the plaintiffs were attacked because of their economic, rather than their political, association. However, an animus directed against nonunion association is closely akin to animus directed against political association. Second, the position of these nonunion employees in Jefferson County, Texas, is markedly similar to that of the Republicans in the South. The presence of these nonunion employees in "union country," no less than the presence of the Republicans in the previously Democratic stronghold, ignited a pervasive regional hostility. It was this regional hostility which classified Republicans as protected. In this case, the same hostility toward nonunion employees classifies them as the kind of persons Congress intended the Ku Klux Klan Act to protect.

Similarly, acknowledging that the scope of the statute includes nonunion workers who are attacked for their choice to associate with other nonunion workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. While Congress specifically refused to prohibit discrimination against bankrupts by legislation, it expressed a desire to protect laborers who opt not to affiliate themselves with a labor organization. Section 7 of the original Wagner Act provided

> [e]mployees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Wagner Act, § 7, 49 Stat. 452 (1935).

At the time Congress passed the original Act, it rejected the argument that parity required granting protection against coercive tactics of labor organizations as well as against those committed by employers. *See* S.Rep. 573, 74th Cong., 1st Sess. 16 (1935). However, significant change was not long in coming. The 1947 Taft-Hartley amendments to the National Labor Relations Act put unfair labor practices by labor organizations in the list of condemned actions. Under the Taft-Hartley Act employees retained the right to form, join, or assist labor organizations. However, section 7 of the original Act was revised to also protect "the right to refrain from any or all such activities." Taft-Hartley Act, § 101, 61 Stat. 140 (1947), currently codified at 29 U.S.C. § 157. Section 8(b)(1) now declares it to be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed by section 7. 29 U.S.C. § 158(b)(1). By these actions Congress has

underscored the importance of the right of free association in the labor relations context and guaranteed the right to free and untrammeled choice to associate or not to associate with a labor organization. This manifestation of congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate.

Finally, *McLellan* regarded the Supreme Court's refusal to call the right to file a bankruptcy petition a fundamental right as relevant to its own determination that bankrupts are not protected by section 1985(3). By contrast, the Supreme Court has characterized the right of free association as "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236 (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Gilmore v. City of Montgomery*, 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321 (1974). The importance of the freedom of association has led the court to call it one of the "indispensable liberties," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values. Thus, the difference in importance assigned to the right to file a bankruptcy petition and the right of the individual to freely associate with others of his own choosing favors protecting these plaintiffs.

Although we find that Congress intended to classify these nonunion employees as entitled to use section 1985(3) that finding does not resolve the question of whether their employer, which is not a member of the class, can assert a claim under this section. Section 1985(3) provides that "in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, . . . the party so injured . . . may have an action for the recovery of such damages, occasioned by such injury. . . ." The language of section 1985(3) specifically provides a remedy for any person injured by an act taken in furtherance of the conspiracy. *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 390–91, 99 S.Ct. 2345, 2358, 60 L.Ed.2d 957 (1979) (White, J., dissenting) (reaching an issue not addressed by the majority). *But see Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 712 (9th Cir. 1981).

The district court found that Cross Construction had been injured by the attack on its Alligator Bayou worksite. There is no dispute as to the fact of the corporation's injury or that it resulted from the defendants' acts in furtherance of the conspiracy. The plain language of the statute grants the employer a right to recover for these injuries. *Cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

The plaintiff, Cross Construction Company, was denied the equal protection of law because, in this "union country" area, it attempted to construct a government project without entering into a collective bargaining agreement to hire nonunion workers. The plaintiff class of Cross em-

ployees were denied equal protection because they dared to try to work nonunion in this place. Both employer and employee plaintiffs were attacked and beaten and their property was destroyed because union adherents put themselves above the law and used brute force to enforce their territorial claim. The actions of plaintiffs and the reaction of defendants joined to define the class and designate the persons who could claim the protection of section 1985(3). The plaintiff employees form a class of nonunion workers who have a right not to belong to a union and the plaintiff employer is a person who has been injured by a class-based invidiously discriminatory animus directed toward its workers and it.

[10–12] Our decision does not hold or imply that every union-nonunion controversy can create a section 1985(3) cause of action. Neither does it hold or imply that every instance of violence arising in the context of a dispute about employment will necessarily do so. Powerful limitations exist to restrict an overly broad application of the statute. *See generally McLellan*, 545 F.2d at 940–41 (Godbold, J., dissenting). Section 1985(3) cannot be invoked to disrupt the operation of a carefully integrated statutory scheme. *See Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979).[12] Neither can a section 1985(3) cause of action be predicated upon an unfair labor practice, without more. *Cf. United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974) (holding an unfair labor practice not cognizable under 18 U.S.C. § 241, the criminal analogue to section 1985(3)). Neither unionism nor nonunionism suffices to create a covered class. But where, as here, there is no campaign to organize employees and force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.[13]

12. *Novotny* held that a right created by Title VII could not be asserted under section 1985(3). To do so would allow a litigant to bypass the statutory plan, particularly the administrative process, created by Congress. *See* 442 U.S. at 375 76, 99 S.Ct. at 2350 51. Because the litigants here have not attempted to assert a right created by the National Labor Relations Act, the concerns expressed in *Novotny* are inapposite to this case.

13. It should be observed that the National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which the union is held responsible. *See* Union de Tronquistas Local 901 (Hawk Joint Pipe & Co.), 202 N.L.R.B. 399 (1973); R. Gorman, Basic Text on Labor Law 217 (1976); D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 99 100 (1976). The Board's refusal to give damage awards is predicated in part upon its view that such awards would unduly interfere with the policy of the National Labor Relations Act to protect concerted activities and that other remedies against union violence are sufficient deterrent. Union de Tronquistas, 202 N.L.R.B. at 400. Its practice is also grounded in concern for the proper institutional role to be played by the Board. *See* District 1199, National Union of Hospital and Health Care Employees (Frances Scherver Home and Hospital), 345 N.L.R.B. 105 (1979) (Board is not equipped to handle personal injury claims); Union Nacional de Trabajadores, 219 N.L.R.B. 157 (1975) (awards are punitive and, therefore, not part of the Board's statutory function).

Whatever the basis for the Board's refusal to order compensation for injuries suffered during strike or picket line violence, our decision that section 1985(3) affords a remedy in this case does not offend that policy. In this case, no lawful concerted activity was taking place when the Cross construction site was attacked. There was no organizational campaign, no union demand for recognition, no informational picket, and no collective bargaining in progress. In such circumstances, a civil remedy for damages presents no danger of thwart-

IV. THE CONSTITUTIONAL QUESTION: THE SOURCE OF CONGRESSIONAL POWER

[13] Having determined that section 1985(3) was intended to provide a civil remedy for the kind of conspiracy involved here, we must respond to defendants' argument that Congress lacks the constitutional power to enact legislation of this breadth. The plaintiffs maintain that section 5 of the Fourteenth Amendment authorizes Congress to provide a civil remedy for this private conspiracy. On the particular facts before us, we hold that the Commerce Clause empowers Congress to reach defendants' conduct and do not reach the Fourteenth Amendment issue.

Griffin emphasized that it was unnecessary to test the constitutionality of section 1985(3) in all conceivable applications in order to sustain its facial constitutionality and its application to the facts of any particular case. 403 U.S. at 105, 91 S.Ct. at 1799, 29 L.Ed.2d at 350. *Griffin* also makes clear that section 1985(3) is not unconstitutional merely because it reaches wholly private conspiracies. *Griffin* does, however, indicate that a source of congressional power must be identified to warrant application of the statute in each case.

The *Griffin* court concluded that the Thirteenth Amendment and the constitutional right to interstate travel authorized Congress to reach the private conspiracy alleged there. But the court concluded its opinion, stating

> In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.

Id. at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351.

The plaintiffs' 1985(3) action cannot be sustained under the Thirteenth Amendment, for they are neither a racially oppressed group nor suffering in the bonds of involuntary servitude. *See, e.g., Jones v. Mayer*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905). Neither can it be supported by the right to travel on the present record. Although the plaintiffs alleged that the object of the defendants' conspiracy was to deprive them of the right to interstate travel, they have introduced no evidence to show that either the purpose or the result of the conspirators' acts was to infringe upon their right to such travel.

However, the alternative path suggested by *Griffin* is itself fraught with uncertainty. A major controversy still exists over the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct. Particularly, whether section 1985(3) can be constitutionally applied to private, nonracially motivated conspiracies is a question which has divided the circuits. *Compare Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) *and Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (holding that the Fourteenth Amendment authorizes Congress to reach purely private conduct) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (finding that it does

ing the Board's policy. However, whether section 1985(3) should also extend to other conspiracies against nonunion workers and their employers is a question which we expressly pretermit.

not). Furthermore, no single interpretation of the expanse of Congress's power under section 5 has consistently commanded the adherence of a majority of the Supreme Court. *Compare United States v. Guest*, 383 U.S. 745, 762, 86 S.Ct. 1170, 1180, 16 L.Ed.2d 239, 251 (1966) (Clark, J., concurring, joined by Black and Fortas, J.J.) *and id.* at 782, 86 S.Ct. at 1190, 16 L.Ed.2d at 263 (Brennan, J., concurring and dissenting, joined by Warren, C. J. and Douglas, J.) (suggesting that § 5 empowers Congress to punish purely private conspiracies to deprive Fourteenth Amendment rights), *with, id.* at 753–60, 86 S.Ct. at 1175–80, 16 L.Ed.2d at 246–50 (opinion of the Court by Stewart, J., relying on right to interstate travel) *and id.* at 762, 86 S.Ct. at 1180, 16 L.Ed.2d at 251 (Harlan, J., concurring and dissenting). *See Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

We need not depend on this uncertain precedent for congressional power. *Griffin* clearly contemplated that other sources of congressional power might be available to justify other applications of section 1985(3). Indeed, the original proponents of the Ku Klux Klan Act did not base their assertion of congressional power exclusively on the Fourteenth Amendment. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 81 (1871) (remarks of Rep. Bingham) ("It was always competent for the Congress of the United States by law to enforce every affirmative grant of power . . . ."); *id.* at 477–78 (remarks of Rep. Shellabarger (referring to the amendment to § 2 "so far as it is not confined to infractions of rights which are clearly independent of the Fourteenth Amendment, referable to and sustained by the old provisions of the Constitution"). On the facts presented in this case, we hold Congress has the authority to reach a wholly private conspiracy under the commerce power conferred by article I, section 8 of the Constitution.

A.A. Cross Construction Company is a general contractor in the building and construction industry. The record indicates that during the year preceding the violent episode of January 17, 1975, Cross had performed work outside of Texas valued in excess of $300,000. During that same period, Cross purchased goods and materials which originated outside of Texas, were used in its operations within Texas, and were valued at more than $50,000. In addition, at the time of the attack on the Alligator Bayou construction site, Cross was performing its obligations under a contract with the United States Army Corps of Engineers.

[14] Article I, section 8, clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce . . . among the several states" and clause 18 of the same article grants it the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ." As the Supreme Court has pointed out, this grant of power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805,

811 (1949). *See United States v. Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, 619 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937). Moreover, that the volume of goods and supplies purchased by Cross or that the volume of business done outside of Texas is comparatively small in terms of the total amount of goods moved or work performed in interstate commerce is not significant. *Katzenbach v. McClung*, 379 U.S. 294, 300–01, 85 S.Ct. 377, 382, 13 L.Ed.2d 290, 291 (1964); *Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82, 90, 87 L.Ed. 122, 136 (1942). Judicial inquiry is limited to asking whether Congress had "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." *Katzenbach v. McClung*, 379 U.S. at 304, 85 S.Ct. at 377, 13 L.Ed.2d at 298. And it is not constitutionally relevant that Congress was actually "legislating against moral wrongs" when it enacted the provisions in question. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257, 85 S.Ct. 348, 357, 13 L.Ed.2d 258, 268 (1946). Chief Justice Marshall's classic formulation of the extent of congressional power is still viable.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 4 Wheat 316, 421, 4 L.Ed. 579, 605 (1819).

By these standards, Congress acted within its constitutional power when it enacted section 1985(3) to reach the private conspiracy involved here. It cannot be denied that the aim of protecting interstate commerce from undue burdens is a legitimate end. Congress could reasonably have determined that violent attacks and vandalism perpetrated on the workers of a construction firm engaged in interstate commerce would have a disruptive effect on the flow of products and services among the states. It is also beyond dispute that the aim of protecting interstate workers in the exercise of their First Amendment associational freedoms is a legitimate end. The means adopted for the accomplishment of these ends, a private civil remedy for damages, is plainly reasonable and appropriate. Section 1985(3) as applied to the facts before us is not prohibited by the Constitution and is compatible with both its letter and its spirit. Whether section 1985(3) can constitutionally be applied to other kinds of wholly private conspiracies to deprive persons of their civil rights is a question for another day.

V. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

A. *The Standard of Proof*

[15] The unions contend that they cannot be held liable for unlawful acts committed at the Cross construction site by some individual members of their organizations without "clear proof" that they actually participated in the unlawful conduct, gave prior authorization of it, or ratified the acts after actual knowledge of their commission. This more rigorous standard of proof derives from section 6 of the Norris-LaGuardia Act which provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States

> for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106. This statutory standard of proof thus lies somewhere between the traditional burdens of reasonable doubt and preponderance of the evidence. With it, Congress intended to require "clear, unequivocal, and convincing proof" of union involvement in unlawful conduct to impose liability for it. *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1145, 16 L.Ed.2d 218, 234 (1966). Yet, while section 106 requires clear and convincing evidence as to union authorization, participation in, or ratification of the acts allegedly performed by its members, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).

[16, 17] The unions also recognize that section 106 is by its own terms limited to cases in which the union is participating or interested in a labor dispute. The Norris-LaGuardia Act defines a "labor dispute" to encompass

> any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). The unions insist that the literal language of section 113(c) squarely covers the conduct at issue here. The persons who planned and executed the attack on the Alligator Bayou construction site were motivated by a desire to punish Cross for engaging in employment practices which violated their misperceived area of exclusive control and to punish those who would work for Cross without attorning to them. Because the conspiracy that generated the case was formed around this nonunion animus, the defendants maintain that the controversy out of which this case arose cannot be anything other than a labor dispute.

This approach has a certain superficial appeal. The attack on the Cross construction site was certainly conceived in reprisal for the refusal of Cross and his workers to accede to demands that the Alligator Pumping Station project be conducted as a union job. Nevertheless, in construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy. In that light, these unions were not participating in a "labor dispute" as that language is employed in section 113(c) because their activity does not fall within the abuses that Congress intended to prevent.

The Norris-LaGuardia Act was passed in a particular social, economic, and legal milieu. During the early part of this century, federal injunctive powers were often invoked to check the spread of union organization and collective bargaining. But Congress conceived that the courts were being made to play a partisan role in labor-management conflicts, in part because judicial injunctive relief usually did nothing to resolve the underlying industrial dispute. The Norris-LaGuardia Act was intended to

curb this unwarranted judicial interference in the struggle between employers and employees. Instead, Congress decided to allow such controversies to be settled through negotiation and through the free play of economic forces.

> The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Rd., 353 U.S. 30, 39, 77 S.Ct. 635, 640, 1 L.Ed.2d 622, 628 (1957). Thus, the policy section of the Act stresses the worker's "freedom of association, self-organization, and designation of representatives of his own choosing" as indispensable to the private settlement of these disputes. 29 U.S.C. § 102. Congress thereby made the use of legitimate economic weapons—the picket, the strike, the boycott—part of the warp and woof of our national labor relations policy. *See generally Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250–51, 90 S.Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 100–03, 61 S.Ct. 122, 127–28, 85 L.Ed. 63, 68–70 (1940); A.Cox, D.Bok, & R.Gorman, Labor Law 60–64 (8th ed. 1977).

One of the special abuses identified by Congress was the use of vicarious liability doctrines under which the misconduct of a few individuals could be attributed to the labor organization that sponsored a strike or picket line. Courts had applied the common law of conspiracy to hold unions responsible not only for the conduct of their authorized agents, but also "for every act committed by any member of a union merely because he was a member, or because he had some relation in the union although not authorized by virtue of his position to act for the union in what he did." *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395, 419, 67 S.Ct. 775, 788, 91 L.Ed. 973, 991 (1947) (Frankfurter, J., dissenting).

Congress recognized that this dragnet conspiracy approach to union responsibility could frustrate its chosen labor relations policy. Imposing liability on the union for the unauthorized lawlessness of its more improvident members would penalize the union lawfully engaged in using the legitimate economic weapons necessary for the proper resolution of labor-management conflicts. Therefore, Congress enacted section 106, requiring clear proof of union participation in, authorization, or ratification of unlawful conduct before liability could attach.

However, there is no danger of frustrating the congressional policy favoring collective bargaining and no risk of punishing union engagement in protected activity in the case before us. When the events giving rise to this case occurred, no union had a collective bargaining agreement with Cross, and none was seeking recognition as the collective bargaining representative for Cross's workers. No solicitation or other organizational efforts were in progress to attain representation of the Cross employees. No labor organization was engaged in informational picketing to publicize Cross's employment practices. In short, the attack on the Alligator Bayou construction project did not grow out of any legitimate union activity. The employer-employee relationship was not the matrix of the controver-

sy.[14] The district court found: "the acts of violence ... are manifestations of the ill-will and hatred these union members harbor toward non-union individuals, as well as an attempt by the unions to intimidate and coerce these non-union people from working or being employed within a 'union area.'" This is not the kind of controversy contemplated by Congress when it required "clear proof" of misconduct by a union "participating or interested in a labor dispute."

[18] On the other hand, a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity. *See, e.g., Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers Int'l Union*, 362 F.2d 322, 327 28 (5th Cir. 1966). A labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. *See, e.g., Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 370–71, 80 S.Ct. 779, 783–84, 4 L.Ed.2d 797, 801–02 (1960); *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339 n.15, 80 S.Ct. 761, 766 n.15, 4 L.Ed.2d 774, 781 n.15 (1960); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. at 103, 61 S.Ct. at 128, 85 L.Ed. at 70. But neither situation is present here. Our holding, therefore, is necessarily a very narrow one: where a labor organization purposefully adopts violence as its course—violence not associated with or happening to result from any ongoing legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c). Since the violence at the Alligator Bayou construction site did not occur in conjunction with a labor dispute, the clear-proof standard of section 106 is not applicable.

B. *Sufficiency of the Evidence*

The unions finally urge that the evidence adduced at trial is insufficient to support the judgment against them under any standard of proof. After carefully reviewing

14. In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, — U.S. —, 102 S.Ct. —, 72 L.Ed.2d —, 50 U.S. L.W. 4789 (U.S. June 24, 1982), the Supreme Court considered whether a politically motivated strike was a "labor dispute" within the meaning of the Norris-LaGuardia Act. Two controversies were involved: a political strike and a dispute over whether that strike was barred by the no-strike pledge in the collective bargaining contract. The dispute over the no-strike clause was held to be sufficient to bring the employees' actions within the protections of the Norris-LaGuardia Act. *See id.* at —, 102 S.Ct. at —. In the case before us there was no strike and no underlying collective bargaining contract dispute. The holding of *Jacksonville Bulk Terminals* does not affect our holding today.

The Court noted that even if the dispute over the contract term were absent, this controversy might still be a "labor dispute." The Court reasoned that the union's political "objections were expressed in a work stoppage by employees against their employer, which focused on particular work assignments." *Id.* at — n.12, 102 S.Ct. at — n.12. Thus, the test for determining a labor dispute, whether the employer-employee relationship is the matrix of the controversy, might have been satisfied. *See id.* However, the Court also noted the continuing viability of *Columbia River Packers Association v. Hinton*, 315 U.S. 143, 62 S.Ct. 520, 86 L.Ed. 750. It found that *Hinton* stood for the proposition "that the protections of [the Norris-LaGuardia Act] do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with nonlabor groups in restraint of trade." *Jacksonville Bulk Terminals v. International Longshoremen's Association*, — U.S. at —, 102 S.Ct. at —. The broad scope of the Norris-LaGuardia Act does have limits. In the case at bar, those limits were exceeded. The defendants were not acting as labor groups. Instead, they sought to dominate "their" territory through force and violence.

the entire record, we agree that the evidence does not warrant the district court's finding of involvement in the conspiracy for many of the unions vouched in judgment. However, as to the remaining unions, we cannot say that the factual conclusions reached by the district court are clearly erroneous.

[19, 20] The factual findings made and the inferences drawn by the district court "come here well armed with the buckler and shield" of the clearly erroneous rule embodied in Federal Rule of Civil Procedure 52(a). *Horton v. U. S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 765 (1948). The appellate court must be especially reluctant to disregard a factual finding based upon the evaluation of testimony that draws credibility into question, *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537-38, 93 L.Ed. 672, 676 (1949); it may not consider the evidence anew, *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 151 (1969); and merely because it might have reached a different result on the same evidence will not justify its setting the district court's findings aside. *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96, 70 S.Ct. 711, 717, 94 L.Ed. 1007, 1016 (1950).

[21] The court below concluded that the assault on the Alligator Bayou construction site "evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 1975, wherein a 'citizen protest' was discussed and a time and place were chosen for such a protest." 461 F.Supp. at 226. However, the evidence in the record does not support this inference. There was nothing unique about the January 15 congregation; it was the Council's regularly scheduled weekly meeting. The minutes of the meeting contain only one cryptic entry which might conceivably be construed to refer to the Cross construction site protest, and it is wholly innocuous.[15] In addition, those union representatives who actually attended the meeting testified that the committee discussed the Cross project and that some members mentioned they had heard of a demonstration to be held on the jobsite the following Friday. The import of their testimony is that the protest had already been conceived several weeks before January 15 and that neither the time nor the place for it were set by the Council. Furthermore, there is no evidence that the Council endorsed the planned protest: no motions were offered and no formal resolutions were adopted. The only connection between the Wednesday meeting and the Friday violence is the nearness in time between the two events. Given the regular sequence of such weekly meetings, this link is too tenuous. As to those unions linked only by the evidence of their participation in the January 15 meeting of the Sabine Area Building and Construction Trades Council, the judgment of the district court must be reversed.

An additional fact casts the district court's error into even sharper relief. The court exonerated two unions as to which the only evidence of involvement was their

15. The minutes show that the "good and welfare" of the community were discussed.

representation at the January 15 meeting, yet it held other unions liable even though the proof against them was no stronger. Furthermore, the district court held the Operating Engineers, Local 450, liable, and that organization neither belonged to the Building and Construction Trades Council nor attended its January 15 meeting nor was otherwise shown to be connected with the violence. The additional evidence relevant to the Operating Engineers is no more compelling. The judgment against the union of Operating Engineers, Local 450, too must be reversed.

However, the situation is different with respect to the United Brotherhood of Carpenters and Joiners of America, Local 610. In mid-summer of 1974, before construction began on the Alligator Bayou project, Cross received a visit in his Houston office from an official of the union. John Wallace, financial secretary and business representative for the Carpenters Local 610, gave Cross his business card and informed him that he wanted the union to furnish laborers for the job. He also asked Cross to sign a union contract. Cross agreed to hire members of Wallace's union but refused to enter into the proposed agreement. Wallace then told Cross that his refusal would "cost him a million dollars."

Wallace had no further contact with the Alligator Bayou project until January 17, 1975, when the attack occurred. On that day, Wallace was present at the highway near the access road which led to the Cross jobsite on at least two separate occasions. More damaging, however, is the fact that Wallace was also observed with Robert Faulk, subsequently identified as one of the principal participants in the violence committed that morning. The two men, riding in Wallace's pickup truck, drove part of the way down the road leading to the construction site, confirmed that the Cross workers had arrived at the scene, and returned to the highway. Shortly thereafter, the mob attacked Cross's workers. Wallace admitted that he was at the highway and that he and Faulk approached the construction site together. Not surprisingly, however, his version is less sinister. He also testified that he saw some members of Local 610 and that, before leaving the area, he expressly instructed them not to engage in any violence. From this evidence, the district court concluded that the union had actually participated in the conspiracy, and we cannot say that his factual inferences and credibility resolution are clearly erroneous. Therefore, the judgment against the United Brotherhood of Carpenters and Joiners, Local 610, is affirmed.

Similarly, we affirm the judgment against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195. Bruce Hill, one of two business representatives for the local, appeared at the Cross construction site shortly after the violence had ended. Fulton Johnson, the Corps of Engineers inspector assigned to the Alligator Bayou project, described Hill's conduct at the scene. He testified that Hill was laughing and joking and that his light-hearted demeanor and remarks were highly inappropriate for the gravity of the situation. While Johnson and a colleague were attempting to take photographs of the damage, Hill repeatedly interposed himself in front of the camera, urging him to take his photograph with a burning trailer behind him. Johnson recalled that Hill sarcastically told them he wanted the photograph to post on the bulletin board at the local so that "he could show his men what not to do."

Like Wallace, Hill himself gave a more innocent account of the episode, and denied saying that he wanted the picture for the union bulletin board. His explanation for seeking the photograph was, "I don't know. I guess I am a camera freak. I like to have my picture taken." Although the local's other business representative had attended the January 15 meeting of the Trades Council when the protest was discussed, Hill said he first learned of the events around 8:00 that Friday morning when he overheard some men talking at a grocery store. He stated that he went to the Cross construction site to check on a friend who worked nearby, even though he had never been there to see him before. Although the evidence is sparse, we cannot say that the district court's finding that the Pipefitters Local 195 was involved in the conspiracy is clearly erroneous.

Lastly, we also affirm the district court's finding as to the United Brotherhood of Carpenters and Joiners of America, Local 753. Jay Desormeaux and Curtis Beasley, members but not officers of Local 753, were both observed on the Cross construction site during the violent melee of January 17. Desormeaux recounted a conversation he had with Randy Wylie, assistant business agent for the local, on the preceding Wednesday or Thursday when they discussed the planned protest. Wylie admitted that Desormeaux had called him to ask about the demonstration but denied instructing him to go to the work site. Wylie also admitted seeing Desormeaux at the highway on the fateful Friday morning.

There was still more evidence suggesting that the union had authorized the unlawful conduct. Both Desormeaux and Beasley were named as defendants in this lawsuit. Beasley testified that, after the suit was commenced, Wylie had referred him to the union's own lawyers for representation in matters connected with his part in the violent events of January 17. Desormeaux also stated that he had spoken with both Wylie and W. H. Carr, business agent for Local 753, about obtaining a lawyer and expressed his belief that the union would pay his attorney fees. Carr informed Desormeaux that the union furnishing him with a lawyer would be "the least they could do," since he was a union member. However, Desormeaux knew of no formal arrangement by which the union regularly provided legal services to its members and conceded that the union had never done so for him. Wylie denied talking with Desormeaux about attorney fees, but, apart from that denial, the union made no effort to rebut this testimony. It did not deny furnishing legal services for its members in actions arising from the violence. The evidence in the record permitted the inference that the union sponsored the attack on the Cross employees and then undertook to lend assistance to its members who were discovered in the unlawful enterprise. The appellate issue is not whether we might have taken a different view had the evidence been presented initially to us. It is whether the district court's determination that the Carpenters Local 753 authorized or participated in the attack is clearly erroneous. It is not.

VI. CONCLUSION

In summary, we hold that (1) the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district court of jurisdiction to enjoin violence, and (2) Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a

conspiracy designed to deprive nonunion workers of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113(c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable. We conclude that the district court's findings that the Carpenters Local 610, Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the district court's judgment against the remaining eight unions.

In light of the foregoing, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

ALVIN B. RUBIN and JERRE S. WILLIAMS, Circuit Judges, with whom JOHN R. BROWN, VANCE, KRAVITCH, RANDALL, TATE and SAM D. JOHNSON, Circuit Judges, join, dissenting:

No one can condone an unprovoked and brutal attack on law-abiding citizens who are peacefully minding what is literally their own business. However, the issue before us is not the reprehensibility of the conduct but whether the district court properly issued an injunction in a case over which, we submit, Congress has, by the terms of the Norris-LaGuardia Act, denied federal courts jurisdiction. Our colleagues also interpret the Ku Klux Klan Act of 1871 in an unprecedented fashion to permit damages to be imposed for an assault, a state law tort, merely because it occurred in the course of a dispute about whether union or nonunion workers would do a job. Further our colleagues impose t' is liability without the stringent evidentiary findings exacted by the Norris-LaGuardia Act. We, therefore, respectfully dissent.

The factual background is accurately stated in the majority opinion. These facts lead the majority to conclude that the defendant labor organizations purposefully adopted violence as their course, Slip op. page 15467, page —— *supra*, that a group of about fifty persons who were either union members or union sympathizers drove to the jobsite in four pickup trucks, and there brutally beat A. A. Cross ("Cross"), the president and controlling stockholder of A. A. Cross Construction Company, Inc. ("Cross Construction"), and several of the construction company's employees, including Paul Scott and James Matthews. Scott was an engineer and assistant superintendent; Matthews was a bookkeeper and timekeeper.[1]

1. James Matthews did not testify at trial, nor was he deposed by any party. The district court, however, awarded him $5,000 in damages from the defendant labor unions. A. A. Cross stated in a post-trial deposition that, after the January 17 incident, he decided to maintain Cross Construction's records in Houston and accordingly paid Matthews's Houston hotel bill while Matthews worked there on the company's recordkeeping. Cross further testified that Matthews had been threatened several times after the January 17 incident, was subsequently fired from Cross Construction for cause, and that he did not know Matthews's current whereabouts. Paul Scott stated in his deposition that, to the best of his knowledge, Matthews was in New York.

I. THE PRIVATE INJUNCTION AND THE NORRIS-LAGUARDIA ACT

The judgment of the district court affirmed by the majority included a permanent injunction against the defendant labor organizations. The majority, in finding that the district court had authority to issue the injunction, neglects the original purpose, as well as the half century of interpretation and application, of the Norris-LaGuardia (Anti-Injunction) Act, 29 U.S.C. §§ 101–115 (1976), passed in 1932.

The patent purpose of the Norris-LaGuardia Act was to limit stringently the jurisdiction and authority of federal courts to enjoin labor disputes.[2] The Act requires three determinations. First, the court must decide whether a labor dispute is involved. Second, to have jurisdiction to issue an injunction under the Act, the court must make all five findings required by 29 U.S.C. § 107: (1) unlawful acts have been threatened and will be committed or have been committed and will be continued; (2) irreparable injury will follow; (3) the balance of injury is more severe on the complainant than the harm the injunction inflicts on the defendant; (4) there is no adequate remedy at law; and (5) the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection. Third, the injunction, if issued, must not prohibit any of the activities listed in 29 U.S.C. § 104.[3]

2. When the Labor Management Relations (Taft-Hartley) Act of 1947 was passed, there was concern that the power given to the National Labor Relations Board to obtain injunctions in labor disputes and to issue cease and desist orders was a limitation upon the Norris-LaGuardia Act. The Taft-Hartley Act did indeed curtail the Norris-LaGuardia Act, but it was carefully written to ensure that no increased power to obtain labor injunctions was placed in the hands of private litigants. The labor injunctions and cease and desist orders authorized by the Taft-Hartley Act against unions and their members must be initiated and controlled by the government. Senator Smith, who was handling the debate on the Taft-Hartley Act on the floor of the Senate on behalf of its proponents, was asked if the Taft-Hartley Act would not "slice a wedge" from the Norris-LaGuardia Act on injunctions. His reply was "we were very careful in this bill to protect the injunctive process as it is protected in the Norris-LaGuardia Act, *except in the exceptional cases where the Government has to step in.*" Cong.Rec. 4,411 (April 30, 1947) (emphasis added).

The Supreme Court later commented:

> The short answer to the argument that the Labor Management Relations Act of 1947 . . . has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party.

Bakery Sales Drivers Local 33 v. Wagshal, 333 U.S. 437, 442, 68 S.Ct. 630, 632, 92 L.Ed. 792, 796 (1948).

3. No court has jurisdiction to issue an injunction growing out of a labor dispute to prohibit any persons from doing any of the following:

> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in [section 3 of this Act];
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

The majority concedes that the requirements of § 107 were not met in this case, slip op. page 15449 n.3, page —— n.3 *supra*, but sidesteps deciding whether this is jurisdictional. The statute itself, however, is unequivocal: "No court of the United States shall have *jurisdiction* to issue a temporary or permanent injunction . . . except after [the required] findings of fact [have been made] by the court." 29 U.S.C. § 107 (emphasis added). Indeed, the entire thrust of the Norris-LaGuardia Act is to deny district courts jurisdiction with respect to injunctions in labor disputes.[4] Our colleagues justify the injunction, however, by finding that there was no "labor dispute" as defined in the Act. That definition is:

> The term "labor dispute" includes *any controversy concerning terms or conditions of employment, or concerning the association* or representation *of persons in* negotiating, fixing, *maintaining*, changing, or seeking to arrange terms or conditions of *employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.*

29 *Id.* § 113(c) (emphasis added).

Even according to the majority view, this was a "controversy concerning terms or conditions of employment" *and* "concerning the association . . . of persons in . . . maintaining . . . employment." Not only was the controversy thus one literally embraced by the Act, but it was also covered by the Act's embracive purpose. The definition of a labor dispute is broad and should be broadly read because the Act caters to the need of labor organizations to organize entire industries. Gregory & Katz, Labor and the Law 190 (3d ed. 1979). It abrogates the view, once held by some, that there can be a labor dispute only between persons in an employee-employer or prospective employee-employer relationship. Instead, it includes in its ambit all laboring people and their unions. It is not confined to formal efforts to have employees sign union authorization cards. Its terms precisely characterize as a labor dispute the controversy involved in this case: a group of employees and labor unions protesting the failure of an employer working in their community to hire union workers and to sign collective bargaining agreements with local unions.

While the unions were not engaged in a formal campaign to sign up employees of Cross Construction at the exact time of the critical incident,[5] the entire thrust of their activities from the time Cross Construction entered the community was organizational. As the majority opinion indicates, on one occasion the business representative for the carpenters' local told Cross, "this is union

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in [section 3 of this Act].

29 U.S.C. § 104.

4. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329-30, 58 S.Ct. 578, 581-82, 82 L.Ed. 872, 877 (1938) ("The District Court made none of the required [§ 107] findings save as to irreparable injury and lack of remedy at law. It follows that in issuing the injunction it exceeded its jurisdiction.").

5. As the majority reports: "Cross did not have a collective bargaining agreement with any labor union." Slip op. page 15446, page —— *supra*.

country," and added that, if Cross persisted in using non-union labor, it was "going to cost [him] a million dollars." Slip op. page 15446, page —— *supra*. Cross Construction employees were confronted by local union members in various public gathering places in the community. Local unions and their members also threatened to picket the construction project because it was non-union. The public demonstration the morning the violence occurred was obviously a form of informational mass picketing to publicize Cross Construction's employment practices.

The majority finds that, "where a labor organization purposefully adopts violence as its course—violence not associated with or happening to result from any ongoing legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c)." Slip op. page 15467, page —— *supra*. Violence, however, is not a stranger to the labor union movement nor does its presence vitiate the existence of a dispute. If the dispute concerns labor matters, it does not cease to be a labor dispute because it becomes violent. This court early held that the use of violence to achieve a labor objective does not prevent the activity from being considered a labor dispute within the Norris-LaGuardia Act. *Carter v. Herrin Motor Freight Lines, Inc.*, 131 F.2d 557 (5th Cir. 1942). This view is amply supported throughout the history of litigation under the Act.[6]

The majority concedes that "a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity .... [or where] the otherwise legitimate union conduct is unlawful under some statutory scheme." Slip op. pages 15467, pages —— - —— *supra*. This fails to explain why unlawful conduct falls within the ambit of the Act only if it is connected with *legitimate*[7] union conduct, for the Norris-LaGuardia Act does not confine its definition of labor disputes to those involving legitimate conduct. Indeed, by definition, the Act is applicable *only* when the union is engaging in unlawful conduct.[8] We cannot assume that any

6. *E.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (Court found there was a labor dispute even though members of the United Mine Workers forcibly prevented the opening of a mine staffed by members of a rival union organization, threatened the employer, and beat an organizer for the rival union; mine was finally reopened when UMW miners were hired.); *Milk Wagon Drivers' Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91, 96, 61 S.Ct. 122, 124, 85 L.Ed. 63, 66 (1940) (union organizing drive was acrimonious and frequently violent: "store windows were broken, personal altercations occurred, charges and countercharges were frequent, arrests were made and court proceedings instituted"; nevertheless the Court found that a labor dispute existed); *Lake Charles Stevedores, Inc. v. Mayo*, 20 F.Supp. 698 (W.D. La.1935) (union, striking to gain recognition, engaged in a pitched battle, including gunfire, with private armed guards brought in by port authorities; district court granted an injunction, but only after specific findings that the requirements of § 107 were satisfied.); *see also* Gregory & Katz, Labor and the Law 190 (3d ed. 1979) ("Congress did not give organized labor a complete carte blanche." Labor activities after the passage of the Norris-LaGuardia Act were "still subject to other legal procedures such as criminal proceedings and actions for damages, where appropriate.").

7. Whether the defendants' activities were otherwise "legitimate" depends only on whether the local unions were in compliance with the technical requirements for organizational activity under the National Labor Relations Act. Concededly, they were not. But it is not essential to the existence of a labor dispute that the contest be connected with "legitimate" labor activity or that it be peaceful.

8. *See California Ass'n of Employers v. Building & Constr. Trades Council*, 178 F.2d 175 (9th Cir. 1949) (holding that the controversy in-

court would issue an injunction against *lawful* activities, and of the five prerequisites to the issuance of an injunction, already listed, one demands a finding that unlawful acts have been threatened and will be committed.

A "labor dispute" can, indeed, be fomented even without traditional labor activity. Thus in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 58 S.Ct. 703, 82 L.Ed. 1012 (1938), a grocery store owner was picketed by a group protesting the shop's refusal to hire blacks. No member of the group was employed by the shop, and the group was not a labor organization. The Supreme Court, nevertheless, held that the pickets were publicizing a controversy about the shop owner's "terms and conditions of employment" and that the picketing grew out of a labor dispute.[9]

National policy, as reflected in labor legislation, was being implemented precisely as Congress intended until the district court granted the injunction at the behest of Cross Construction. The National Labor Relations Board ("NLRB") had filed unfair labor practice charges against the Sabine Area Building and Construction Trades Council and the various unions that were council members for their actions, including the violence in the episode that is the subject of this lawsuit. The NLRB had issued a cease and desist order that prohibited the Trades Council and the unions from, among other things:

> (a) Restraining or coercing employees of Cross Construction Co., Inc. or any other employer, in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, including the right to refrain from joining or assisting any constituent local union of Sabine Area Building & Construction Trades Council, AFL-CIO, by: threatening, assaulting, or inflicting bodily harm on said employees, threatening, assaulting, or inflicting bodily harm on supervisory or management personnel of Cross Construction Co., Inc.; and damaging or destroying property and equipment belonging either to Cross Construction Co., Inc., to its supervisory or management personnel, or to its employees.
>
> (b) Organizing, encouraging, sanctioning and engaging in mass picketing by its constituent local unions at the entrance to the roadway leading to the Alligator Bayou Pumping Station and Drainage Structure construction project in order to obstruct or impede ingress or egress to said jobsite.
>
> NLRB Case 23-CB-1624, May 1, 1975.

This order says it all. It was upheld and enforced by us as a result of a settlement stipulation in an unpublished opinion,[10] long before the injunction was issued in this case. Ironically, the majority finds no "labor dispute" in the very situation that caused the NLRB to file charges and to issue a stipulated cease and desist order. The NLRB had jurisdiction only if there

volved a labor dispute although the union was insisting on a closed shop and closed shops had previously been outlawed by the Taft-Hartley Act).

9. *See also Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 80 S.Ct. 779, 4 L.Ed.2d 797 (1960). A union picketed a foreign ship that employed foreign seamen and paid them less than the going American wage rates. The foreign employees had no dispute with the vessel owners, and the unions had no desire to organize or to represent the foreign employees. The Supreme Court held, however, that the Norris-LaGuardia Act applied, finding that the picketing related to the terms and conditions of employment.

10. *NLRB v. Sabine Area Bldg. & Constr. Trades Council*, No. 75-2481 (5th Cir. June 24, 1975).

was a labor dispute. Thus we at once hold an occurrence not to be a labor dispute for purposes of the Norris-LaGuardia Act (which emphasizes the breadth of the definition of labor dispute)[11] but to be one for purposes of the National Labor Relations Act ("NLRA") despite universal recognition that the "definition of 'labor dispute' in this Act [NLRA] and in the Norris-LaGuardia Act . . . are virtually identical."[12]

The brutal assault on Cross Construction employees was overt criminal conduct that should also have been *and was* prosecuted by state law enforcement authorities. The Act permits injunctive intervention only when "public officers charged with the duty to protect complainant's property [and, we submit, their persons] are unable or unwilling to furnish adequate protection." 29 U.S.C. § 107(e), against *future*, not past unlawful activity.[13]

The Supreme Court has just reaffirmed the broad interpretation of the definition of labor dispute in the Norris-LaGuardia Act which has been the law since the Act was passed. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, — U.S. —, 102 S.Ct. —, 72 L.Ed.2d —, 50 U.S.L.W. 4789 (U.S., June 24, 1982). As reported in the majority opinion (fn. 14), the Court held that a dispute involving the refusal to load cargo to Russia in protest of Soviet intervention in Afghanistan was a labor dispute within the meaning of the Act.

The majority opinion relies upon the Court's statement that the employer-employee relationship was the "matrix" of the dispute in *Jacksonville Bulk Terminals*. First, it needs to be emphasized that, as pointed out above, a unionized workforce was the "matrix" of the dispute in the instant case—clearly a labor dispute objective. Second, the matrix statement must be taken in the context that *Jacksonville Bulk Terminals* was a dispute between employers and their employees. As has been shown above, the employer-employee relationship is not a requirement to establish a labor dispute under the Act. Indeed, to show the breadth of the definition of labor dispute in the Act, the opinion in *Jacksonville Bulk Terminals* relies heavily upon the *New Negro Alliance* case, *supra*, where there was not even a prospective employer-employee relationship.

What is of most importance in *Jacksonville Bulk Terminals* is the Court's extensive emphasis upon the history of the development of the Norris-LaGuardia Act to show the breadth of the definition of labor dispute. The Court said that to narrow the definition would "embroil federal judges in the very scrutiny of 'legitimate objectives' that Congress intended to prevent when it passed the Act." — U.S. at —, 102 S.Ct. at —. The Court then concluded: "In the past, we have consistently declined to constrict Norris-LaGuardia's broad prohibitions *except in narrowly defined situations where accommodation of that Act to*

11. The Supreme Court has noted that "Congress made the definition [of "labor dispute" in the Norris-LaGuardia Act] broad because it wanted it to be broad. There are few pieces of legislation where the congressional hearings, committee reports, and the language in the legislation itself more clearly point to the necessity for giving an Act a construction that will protect the congressional policy the Act adopted." *Order of R. R. Telegraphers v. Chicago & N. W. Ry.*, 362 U.S. 330, 335, 80 S.Ct. 761, 764, 4 L.Ed.2d 774, 779 (1960).

12. *National Maritime Union of Am. v. NLRB*, 342 F.2d 538, 541 (2d Cir.), *cert. denied*, 382 U.S. 835, 86 S.Ct. 78, 15 L.Ed.2d 78 (1965).

13. As stated above, the court must find prior to issuing an injunction, that "unlawful acts have been threatened and *will be* committed . . . or have been committed and *will be* continued." 29 U.S.C. § 107(a) (emphasis added).

specific congressional policy is necessary. We refuse to deviate from that path today." *Ibid.* (emphasis added).

No specific congressional policy exists in this case to justify deviation. Instead, congressional policy as clearly established was carried out in the action under the National Labor Relations Act.

The Norris-LaGuardia Act applies to every kind of labor dispute, and not only to conventional organizing campaigns conducted under the auspices of the NLRB. Indeed, as both the NLRB and a panel of this court have found, this was plainly an organizational labor dispute. The federal district court had no jurisdiction to issue the injunction.

II. SECTION 1985(3) DOES NOT GRANT A CAUSE OF ACTION FOR THE DEFENDANTS' CONDUCT

A. The Nature of the Right for Which § 1985(3) Provides a Remedy

Section 1985(3) provides that an injured party "may have an action for the recovery of damages" "[i]f two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the *equal* protection of the laws or of *equal* privileges and immunities under the laws." 42 U.S.C. § 1985(3) (emphasis added).[14] This language does not establish a cause of action for every deprivation of any legal right, privilege, or immunity. The statute condemns only conspiracies to deny *equal* protection or *equal* privileges and immunities. If these restrictive terms are overlooked in interpreting the statute, its reach is ubiquitous; for it would then authorize a federal tort action for every conspiracy to deprive *any person or class of persons* of *any* legal right.

In *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), the Supreme Court recognized that § 1985(3) is premised on a conspiracy to deny equality and is not a general federal tort law.[15] To show that the conspiracy was designed to deny a person equality, the Court said, the plaintiff must demonstrate that the purpose

14. 42 U.S.C. § 1985(3) provides in full:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

15. "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin*, 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. *See also* Cong. Globe, 42d Cong., 1st Sess. 485 (1871) (remarks of Rep. Cook addressing Rep. Shellabarger's amendment to the original proposed Act):

of the conspiracy was "a deprivation of the *equal enjoyment* of rights secured by the law to all," not merely the infliction of an injury on that person. *Id.* at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (emphasis added). The necessary corollary is that a conspiracy merely to injure one person or a group of persons, or even some or all of the members of a *class* of persons, does not give rise to an action under the statute.

This interpretation of the statute is supported by the history of its enactment. That history, often recounted in fragments, is reported at length in Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L.Rev. 402 (1979).[16] Section 1985(3) was adopted in reaction to the activities of the Ku Klux Klan. The original Klan, which had begun to operate in the South prior to 1871, was for the most part a political organization.[17] In enacting § 1985(3), Congress did not seek primarily to prevent racial discrimination but to proscribe conspiracies whose objective or effect was to frustrate the "constitutional operations of government through assaults on the person, property, and liberties of individuals."[18]

The Forty-Second Congress, dominated by a Republican majority, became alarmed at reports of violent activities of the Klan and similar organizations, such as the Knights of the White Camelia, the White Brotherhood, the Pale Faces, and the '76 Association.[19] It established a joint committee to investigate the Klan.[20] The Republican majority thought the Klan's objective was to wrest control of the southern state governments from the Republican Party and to reestablish Democratic governance.[21] Democrats also viewed the Klan's objectives as political,[22] but considered them

> I think it is within the power of Congress to protect and enforce every right secured to American citizens by the Constitution of the United States. I do not believe, and I do not know of any man who does believe, . . . that Congress has a right to punish an assault and battery when committed by two or more persons within a State. I know of no one who believes that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by reason of lawless combination too strong for the State authorities to suppress. The statement that this bill aims at any such end is an utter misstatement of its object and effect.

16. *See generally* 1 Statutory History of the United States 591–656 (B. Schwartz ed. 1970); Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331 (1967).

Section 1985(c) was renumbered § 1985(3). 42 U.S.C. § 1985(3) (Supp. III 1979).

17. *See* Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L.Rev. 402, 408 n.32 (1979) [hereinafter cited as *A Construction of Section 1985(c)*].

18. *Id.* at 403.

19. *A Construction of Section 1985(c)*, *supra* note 17, at 407 n.29, (citing K. Stampp, The Era of Reconstruction 199 (1965)).

20. Cong.Globe, 42d Cong., 1st Sess. 116–17 (1871), *id.* at 180–82.

21. *Id.* at 653, col. 3 (The Klan's "well-defined and clearly-proven object is to gain political control by intimidation and murder.") (remarks of Sen. Osborn (R-Fla.)); *id.* at 484, col. 1 (The "purpose of all this bloody work . . . is for the express purpose of controlling government in the states where these things are done, by preventing citizens from exercising their legitimate constitutional privileges.") (remarks of Rep. Wilson (R-Ind.)).

22. *See id.* at 517, col. 2 ("the minority of the committee reach the same conclusion as the majority reach as to the fact that the disorders have a political origin and purpose, the difference being, in substance, that the majority find it to originate in an aim at the overthrow of the reconstruction laws and the people and State governments they were designed to protect, while the minority seem to conclude that the violence is natural and just in resistance of

honorable, adopted to resist unjust laws and to restore control of governmental affairs to "the wise, virtuous, influential men of the South," dislodging "adventurers and negroes."[23]

The first proposed Ku Klux Klan Act made it criminal to conspire to commit particular crimes "in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States."[24] It authorized no civil action. Some more moderate Republicans opposed the proposal as a usurpation of the states' power to punish crimes. Other members of Congress opposed the enactment on the basis that the federal government lacked power to prohibit the acts of private individuals. Another group believed that Congress could punish only those "private conspiracies intended to obstruct the performance of government officials' constitutional duty to provide equal protection of the laws."[25] Still others believed that, regardless of its power, the federal government should provide protection for individuals against private conspiracies only when the state failed to do so.[26]

An amendment suggested by Congressman Burton Cook (R-Ill.) and drafted by Congressman Charles Willard (R-Vt.)[27] satisfied the constitutional objections and provided an acceptable compromise. For the language first proposed in the criminal statute prohibiting conspiracies "in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and the laws of the United States," the amendment substituted the words "for the purpose of depriving any persons or class of persons, *directly or indirectly, of the equal protection of the laws*, or of *equal* privileges and immunities under the laws."[28] The amendment also added the civil cause of action that we now consider.[29]

It is thus obvious that one purpose of this amendment was to confine the operation of the statute to discriminatory deprivations of rights. As the draftsman of the limiting amendment, Representative Willard, said, the amendment "provid[ed] that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality."[30] Congressman Horatio Burchard (R-Ill.) explained that the conspiracies condemned were "those designed to prevent the equal and impartial administration of justice.... The gravamen of the offense

wicked laws") (remarks of Rep. Shellabarger (R-Ohio)).

23. *Id.* at 386, col. 2 (remarks of Rep. Lewis (D-Ky.)). *See also* additional references in *A Construction of § 1985(c), supra* note 17, at 408-09 & n.32.

24. Cong.Globe, 42d Cong., 1st Sess. 68 app. (1871).

25. *A Construction of Section 1985(c), supra* note 17, at 415, and authorities cited therein. *See generally id.* at 411-17.

26. *Id.* at 415-16, and authorities cited therein.

27. *Id.* at 417.

28. Cong.Globe, 42d Cong., 1st Sess. 477, col. 3 (1871) (emphasis added).

29. *Id.* As one commentator has noted: "This addition of remedy was not a subject of congressional discussion or debate. It was presumably inspired at least in part by concern for the victims of acts of terror or indirect subversion committed to inhibit the exercise of the rights of citizens." *A Construction of Section 1985(c), supra* note 17, at 417.

30. Cong.Globe, 42d Cong., 1st Sess. 188 app., col. 2 (1871).

is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection."[31] Others echoed this analysis.[32]

In *Griffin*, the Supreme Court interpreted § 1985(3) in a fashion consistent both with its literal language and this congressional intention:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

403 U.S. at, 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (footnotes omitted). The statute thus has a "motivation aspect." Relying on the legislative history we have recounted, the *Griffin* Court explained that the requirement of "invidiously discriminatory motivation stressed by the sponsors of the limiting amendment" was necessary to avoid "constitutional shoals." *Id.* The forbidden purpose of § 1985(3) is the denial of equality under the laws, not merely an injury forbidden by law.[33]

Although § 1985(3) reaches both public and private conspiracies to deny constitutional equality, it is a non sequitur to conclude that it, therefore, reaches all constitutional violations. The statute is not designed to protect constitutional rights; it is at once narrower, safeguarding equality, and broader, protecting against any conspiracy to deny equal protection of the "laws."[34]

31. *Id.* at 315 app., col. 2.

32. *Id.* at 478, col. 2 ("The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of remedies of this section.") (remarks of Rep. Shellabarger); *id.* at 486, col. 3 (remarks of Rep. Cook (R Ill.)); *id.* at 514, col. 3 (remarks of Rep. Poland (R-Vt.)).

33. *See A Construction of Section 1985(c), supra* note 17, at 437 ("The enacting Congress did not intend the statute to be an antidiscrimination law. The language of *equal* protection and *equal* privileges and immunities was added as a limitation, not as an expansion.").
This is the interpretation of § 1985(3) that we adopted in *McClellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc). Turning first to what private action constitutes a deprivation of the protection of the laws, we held that "the inquiry must initially concentrate on the legality of the defendants' activity apart from section 1985(3). If the object of the defendants' conspiracy did not include a violation of some law (independent of section 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the 'protection of the laws.'" *Id.* at 925. We then turned to the requirement that the deprivation be of the *equal* protection of the laws, and held that violation of *equality* is a separate component of the action although we declined to decide whether the section extends to other bias than racial. *Id.* at 929.
Section 1985(3) also prohibits conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." Although § 1985(3) claims do not typically allege that state authorities are "unwilling or unable to provide protection," the language of the statute, allows it to reach "indirect efforts to thwart equal protection." *A Construction of Section 1985(c), supra* note 17, at 420.

34. Some courts have held that § 1985(3) covers violations of federal statutory rights. *E.g., Hodgin v. Jefferson*, 447 F.Supp. 804 (D.Md. 1978) (claims based on § 3 of the Equal Pay Act); *Broadcast Employees v. International*

The Supreme Court held in *Griffin* that the reach of § 1985(3) is limited by the requirement that the conspiracy be directed at a denial of equality. Our colleagues state, however, that in *Griffin* "[t]he blacks brought an action under section 1985(3) *to redress violations of the laws of the United States and of Mississippi*, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons." Slip op. page 15450, page —— *supra* (emphasis added). If that were the basis of the action in *Griffin*, then *Griffin* would be authority for a simple tort action. The complaint in *Griffin* was more subtle.[35] In addition to the language quoted by the majority, the complaint stated that the purpose of the conspiracy " 'was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence and intimidation, *from seeking the equal protection of the laws* and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi, including . . . their rights to freedom of speech, movement, association and assembly.' " 403 U.S. at 90, 91 S.Ct. at 1792, 29 L.Ed.2d at 341. The assault on and battery of the plaintiffs were acts done in furtherance of the conspiracy to deny the plaintiffs *equal* rights, not acts designed merely to injure the plaintiffs or to deprive them of the protection of the law.

In *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957, 963 (1979), the Supreme Court held that "[s]ection 1985(3) provides no substantive rights itself; it

Bhd. of Teamsters, 419 F.Supp. 263 (E.D.Pa. 1976) (conspiracy to violate Labor Management Reporting and Disclosure Act), *aff'd in part and reversed in part on other grounds*, 614 F.2d 846 (3d Cir. 1980); *Milner v. National School of Health Technology*, 409 F.Supp. 1389 (E.D.Pa.1976).

In *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370 n.6, 99 S.Ct. 2345, 2348 n.6, 60 L.Ed.2d 957, 962 n.6 (1979), however, the Supreme Court specifically declined to decide "whether § 1985(3) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution." Justice Powell suggested in his concurring opinion that the statute's "reach is limited to conspiracies to violate those fundamental rights derived from the Constitution." *Id.* at 378, 99 S.Ct. at 2352, 60 L.Ed.2d at 967. Justice Stevens went further and said, "I do not believe that [§ 1985(3)] was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted." *Id.* at 385, 99 S.Ct. at 2355, 60 L.Ed.2d at 971 (concurring opinion). Justices White, Brennan, and Marshall expressed the opposite view in their dissenting opinion: "[Section] 1985(3) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution." *Id.* at 384 n.5, 99 S.Ct. at 2357 n.5, 60 L.Ed.2d at 971 n.5; *cf.* Note, *Private Conspiracies to Violate Civil Rights: The Scope of Section 1985(3) After Great American Federal Savings & Loan Association v. Novotny*, 61 B.U.L.Rev. 1007, 1028–33 (1981) (arguing that § 1985(3) should be applied "only to statutes whose primary purpose is to guarantee equal treatment").

Some courts have also held that "[v]iolations of state conferred rights and privileges are sufficient to constitute a deprivation of 'equal protection of the laws.' " *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 504–05 (9th Cir. 1979) (violation of California's Civil Rights Act) (decided before *Novotny*); *accord, Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971) (zoning law infringement). The Supreme Court suggested in *Novotny*, however, that a denial of rights under *state* laws may not be covered under § 1985(3) unless independently unconstitutional. *See* 442 U.S. at 377, 99 S.Ct. at 2351, 60 L.Ed.2d at 966 (§ 1985(3) provides "a civil cause of action when some otherwise defined *federal* right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section") (emphasis added).

35. *Griffin* arose out of the dismissal of a complaint for failure to state a cause of action.

merely provides a remedy for violation of the rights it designates."[36] Thus, § 1985(3) provides a cause of action for *private* interference only with those rights that the Federal Constitution protected prior to the enactment of the Civil Rights Act of 1871, and in particular, for those rights protected by the newly ratified fourteenth amendment. *See Novotny*, 442 U.S. at 383, 99 S.Ct. at 2354, 60 L.Ed.2d at 970 (Stevens, J., concurring). Insofar as equal protection of the laws is concerned, the cause of action is restricted not only to conspiracies to deny *equality*, but the conspiracy must also be directed at the denial of *protection of the laws*, in the sense that it must be aimed at preventing the injured party from obtaining legal protection. *See id.* at 384, 99 S.Ct. at 2355, 60 L.Ed.2d at 971; *A Construction of Section 1985(c), supra* note 17, at 407, 419.

The extension of § 1985(3) to protect against *private* infringement of every right protected against *governmental* action by the Constitution would create a *Bivens*-type tort action against every private conspiracy that affects a federal constitutional right.[37] A citizen has a right to be secure in his property and home, but we do not think that § 1985(3) confers a cause of action for a conspiracy by a person's neighbors to block his driveway in order to keep him from driving his automobile to his place of business. The fourth amendment protects against illegal searches, but we do not think that, if two persons conspire to search their neighbor's house, the neighbor has a § 1985(3) action.[38] In neither case would

36. *Novotny* held that § 1985(3) could not be invoked to redress violations of Title VII. Rights created by the Equal Employment Opportunity Act could not "be asserted within the *remedial* framework of § 1985(3)" because Title VII provided its own remedial apparatus. 442 U.S. at 377, 99 S.Ct. at 2351, 60 L.Ed.2d at 966; *cf.* Note, *supra* note 34, at 1019-21 (arguing that § 1985(3) is "neither purely remedial nor purely substantive, but rather a mixture").

37. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Court held that there was a federal cause of action for damages under the fourth amendment upon proof of damages resulting from violations of that amendment by federal agents acting under color of federal authority.

38. We, therefore, agree with the Fourth Circuit's refusal to recognize a § 1985(3) cause of action for private interference with the "associational right" of belonging to the Ku Klux Klan. *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974). This holding is correct, in part, because the right of association derives from the first amendment—itself framed as a *prohibition* against the *federal government* and not against private persons. A number of other courts have declined to extend § 1985(3) protection to infringements of all constitutional rights.

First amendment:
Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976).

Sex discrimination:
Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976) (employment); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975) (employment), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1683, 48 L.Ed.2d 187 (1976).

Procedural due process:
Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976); *Collins v. Bensinger*, 374 F.Supp. 273 (N.D. Ill.) (recognizing that § 1985(3) refers only to equal protection and not due process), *aff'd mem.*, 506 F.2d 1405 (7th Cir. 1974), *cert. denied*, 422 U.S. 1058, 95 S.Ct. 2683, 45 L.Ed.2d 710 (1975).

Other courts, however, have held that § 1985(3) reaches every private conspiracy that Congress has *power* to forbid. *E.g., Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) (interference with right to vote in tribal elections), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976); *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975) (employment discrimination); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (free speech; distribution of

the addition of violent overt acts metamorphose the tort into a § 1985(3) cause of action.

Unlike *Griffin*, this case does not rest on the adequacy of notice pleading. The plaintiffs have had their day in court. They proved no conspiracy to prevent them from seeking the *equal* protection of the laws, or to deny them that protection, or to bar them from enjoying the *equal* rights, privileges, and immunities of citizens under the laws. Even if there is a "First Amendment right to associate with their fellow nonunion employees," slip op. page 15452, page —— *supra*, a question to which we will soon turn, it would not suffice to prove a conspiracy aimed at denying the plaintiffs this "right." Our colleagues, mistakenly we suggest, assume that "curtailment of [plaintiffs'] interests secured by the First Amendment is a deprivation of *equal* protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*." Slip op. page 15452, page —— *supra* (emphasis added). The mere deprivation of a right, however fundamental, is not a deprivation of *equal* protection. For a denial of equality to be the conspiratorial objective, the conspirators must seek to permit some persons to enjoy the protected right and to deny it to others. The reprobated objectives alleged in *Griffin* included, for example, the denial of the right of black persons to "'travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi.'" 403 U.S. at 92, 106, 91 S.Ct. at 1793, 1800, 29 L.Ed.2d at 342, 350 (quoting the complaint). The proof in this case shows no comparable objective; the defendants did not seek to deny the right to work with nonunion workers to the individual plaintiffs *while according that right to others*.

B. The Right Found Protected by the Majority

Our colleagues interpret § 1985(3) to find that it protects a *constitutional* right of association, or more specifically, the *constitutional* right, first found to exist in this very opinion, of nonunion workers to work with other nonunion workers. This right is analogized to the right of political association. Protection for political association is thus expanded into protection for any kind of association having some economic community of interest. This seems to us to confuse the *right* protected with the *class of persons* protected. Although there is a constitutional right to refuse to work, no court, so far as we know, has ever previously found that workers have a constitutional right to work only with the kind of persons they choose to work with.

If nonunion workers have a constitutional right to work together, then the collective bargaining policy of the National Labor Relations Act is at least in part unconstitutional. Under it, nonunion workers have the right to join or not to join a union. 29 U.S.C. § 157. They have the right to vote against or for a union in a collective bargaining election. *Id.* If, however, a collective bargaining agent is chosen, the workers do not have a constitutional right to bargain individually or to work only with nonunion associates. They may be required to become union members thirty days after being hired, *id.* § 158(a)(3), unless the state has a "right to work" law.[39] Once an em-

campaign material); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc) (free exercise of religion); *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (freedom of expression).

39. 29 U.S.C. § 164(b) ("Nothing in this sub-

ployer is ordered to bargain collectively, employees who are not union members are compelled to work with union members if they choose to work at all. Their employer certainly has no right to employ only nonunion labor—unless the National Labor Relations Act is unconstitutional.

This case does not involve the question whether a person has a right to join or not to join a union, to affiliate or not to affiliate with a political group, or to believe or disbelieve a creed. The desire to work for a nonunion employer cannot be escalated into a first amendment associational right. "What the [Supreme] Court has recognized as implicit in the first amendment . . . is a right to join with others to pursue goals independently protected by the first amendment—such as political advocacy, religious (regarded as a form of advocacy), or religious worship."[40] Although there is obviously some political content in union activity, nonmembership in a union is not a goal independently protected by the first amendment.

C. Discriminatory, Class-Based Animus

The majority does not hold Cross Construction to be a member of any class. We search the majority opinion in vain for something more than an ad hoc definition of the class to which the plaintiffs Scott and Matthews belong. After discussing the necessity of discriminatory class-based animus for two and one half pages, our colleagues state conclusorily, "the plaintiffs constitute a class for 1985(3) purposes."[41] They then discuss the labor union movement and the reputed kinship of economic views with political association, and state that "the plaintiffs were attacked because of their *economic*, rather than their political, association."[42] In the next sentence we are told that there was animus against the plaintiffs for their "nonunion association." The plaintiffs are later referred to as "nonunion employees" and, without noting the distinction, as "nonunion workers who are attacked for their choice to associate with other nonunion workers." Slip op. page 15459, page —— *supra*. It is difficult for us to divine exactly what class is described by these differing phrases, for the evidence makes it clear that Scott and Matthews were not attacked because they were not union members or because they wished to work with "other" nonunion members, but because they chose to work for Cross Construction, a firm that hired nonunion workers and did not pay union wages.[43] Scott was a supervisor and Matthews was a clerical worker. It has not been shown that either of them was even eligible for membership in any of the unions involved.

Let us assume, however, that the facts can be construed to make Scott and Mat-

chapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.").

Texas' Right to Work Law prohibits the denial of employment to anyone because of a failure to pay "any fee, assessment, or sum of money whatsoever" to a union. Tex.Rev.Civ.Stat.Ann. art. 5154a(8a) (Vernon 1971).

40. L. Tribe, American Constitutional Law § 12-23, at 702 (1978) (emphasis and footnotes omitted).

41. Slip op. pages 15455–15457, pages —— —— *supra*.

42. Slip op. page 15459, page —— *supra* (emphasis added).

43. Cross Construction hired the workers they needed without inquiring as to their union affiliation. In fact, some of the Cross Construction employees did belong to unions.

thews members of a class of persons who do not belong to a union and want to work with people who are also nonunion. This, we submit, is not a class protected by § 1985(3). The Supreme Court in *Griffin* said, "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" to warrant § 1985(3) relief.[44] We have gone further and held that § 1985(3) forbids not only racial discrimination but the denial of equality to other classes:[45] those having common characteristics of an inherent nature; that is, classes accorded special protection by the equal protection clause of the fourteenth amendment and "the kinds of classes Congress was trying to protect when it enacted the Ku Klux Klan Act." *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 347 & n.9 (5th Cir.) (en banc), *cert. denied*, — U.S. —, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981).[46] The phrase "the kind of classes Congress was trying to protect" states a purely historical test, directing us to look to the purposes of the Ku Klux Klan Act when it was adopted. *Kimble* suggested as an illustration of classes in this category conspiracies based on the target's affiliation with a major political party. *Id.*

The majority opinion holds that, although the "[p]laintiffs are not a class normally afforded special protection under the equal protection clause merely because they wish to work nonunion," Slip op. page 15456, page —— *supra*, and although "Congress did not express a specific intent to protect nonunion employees in enacting the Ku Klux Klan Act, the legislative history demonstrates that the nonunion employees in this case comprised the kind of class Congress intended to protect," Slip op. page 15458–15459, page —— *supra*. We differ with this conclusion also.

The plaintiffs are, we submit, not members of a class at all,[47] but simply two individuals injured in the same assault. The majority agrees that not every conceivable grouping of persons capable of being defined as a class is protected by § 1985(3). Slip op. page 15456, page —— *supra*. Not only must the class share some common characteristic beyond simply being the victims of a conspiracy, but it must also be distinguishable from the general populace

44. 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (1971).

45. As the majority opinion points out, other circuits have also extended § 1985(3) to cover non-racial classes. Slip op. page 15455, page —— *supra*.

46. *See generally* Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach*, 64 Minn.L.Rev. 635 (1980).

47. We note that in their amended complaint, the plaintiffs purported to represent a class of persons composed of four categories or subclasses of plaintiffs consisting of:

(a) All persons presently employed by A. A. Cross Construction Company, Inc. (hereinafter called "Cross"), their wives and children;

(b) All persons, together with their wives and children, who may become employed by Cross and perform work leading to construction of the Alligator Bayou Pump Station on the hurricane protection levee along Taylor's Bayou near Port Arthur, Jefferson County, Texas;

(c) All persons, their wives and children, and all firms and corporations who may supply, deliver, or provide labor, materials, goods or services to Cross or others for construction of the Alligator Bayou Pump Station;

(d) All persons, their wives and children, who may lawfully be present upon the site of the Alligator Bayou Pump Station, or the ways leading thereto.

Interestingly, we found no indication, in our examination of the record, of any attempt to have the class certified. Final judgment, therefore, was rendered only on behalf of the named plaintiffs.

by this characteristic. *Id.* These are but first steps, and do not enable us to define the § 1985(3) class, for many clearly defined and easily identifiable groups of persons who might be considered a "class" for some other purpose have been denied § 1985(3) class status: homosexuals,[48] tenant organizers,[49] debtors,[50] persons who file voluntary petitions in bankruptcy,[51] physicians who testify in malpractice suits,[52] injured workers who assert claims,[53] and trade association members.[54]

The majority looks to our en banc decision in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), for the gauge to measure whether the Scott-Matthews class is the kind of class Congress intended to protect when it enacted § 1985(3). They correctly recount the three reasons given in *McLellan* for holding that § 1985(3) does not cover persons who file voluntary petitions in bankruptcy.[55]

> First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against them. Third, including bankrupts within the ambit of Section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right.

Slip op. page 15457, page —— *supra*.

But, as our colleagues acknowledge, *McLellan* does not attempt to define what groups *are* and what groups are *not* § 1985(3) classes. *Id. McLellan* sets up only *some* of the criteria *for exclusion*. To determine that the present group is *included* as a § 1985(3) class because it is not one of those *excluded* by *McLellan* is to adopt the erroneous premise that all classes are comprehended except those barred for the same reason bankruptcy petitioners were eliminated by *McLellan*.

Furthermore, we believe that the majority's analysis of the *McLellan* factors is incorrect. The legislative history and, indeed, the popular name of the statute make clear the evil that was addressed, the Ku Klux Klan. Congress in 1871 was assuredly not trying to protect non-union workers, not only because it would not then have recognized the difference between union members and non-members but simply because the Klan posed no threat to such workers. The regional hostility the majority finds as a second identification for an appropriate class could scarcely embrace Cross Construction, a Texas corporation, Paul Scott, a resident of Texas, or James Matthews, also a resident of Texas at the time of the

48. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979).

49. *Carchman v. Korman Corp.*, 594 F.2d 354 (3d Cir.), *cert. denied*, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979).

50. *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979).

51. *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc).

52. *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973).

53. *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (en banc), *cert. denied*, —— U.S. ——, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981).

54. *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984, 94 S.Ct. 1578, 39 L.Ed.2d 881 (1974).

55. *McLellan*, 545 F.2d at 932-33.

incident. Nor does subsequently enacted federal labor legislation suggest that Scott and Matthews are members of a class protected by § 1985(3). That legislation expresses the national labor policy as encouraging collective bargaining. 29 U.S.C. § 102. Although Congress has recognized the "right to refrain from any or all such activities," *id.* § 157, it has never adopted a national labor policy protecting an individual's "right" to work for a nonunion employer. The right to belong or not to belong to a union is considerably different from the asserted "right" to work for a nonunion employer, for, as we have already seen, every employer whose activities affect interstate commerce and his employees are subject to the requirements of collective bargaining. *Id.* § 158(d). Finally, the kinship asserted by the majority to exist between economic and political association is a strange one, for in this country our political parties embrace the entire spectrum of economic classes.

If the class recognized by the majority includes, as we have supposed, persons who do not belong to a union and who want to work for an employer who hires other nonunion employees, there are yet other reasons not to accord such a class § 1985(3) protection. This class is one newly defined by this case, not one having any previous discernible jurisprudential identity. It is not a "class" marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not directed at the membership of the plaintiffs in such a class or at their association together either as persons or in some anti-union group campaign, but at their *activities*: working without union membership for an employer who wished to hire them.

D. The Corporation as a Beneficiary of § 1985(3)

The majority rejects the view that Cross Construction is a member of the protected class.[56] They manage to find a § 1985(3) cause of action in favor of Cross Construction, however, by holding that the statute extends a remedy to *any person* injured by a forbidden conspiracy despite the fact that he is *not* within the protected class.[57] This view extends § 1985(3) protection to injured persons outside the protected class even if no member of that class has filed suit. By this reasoning, if, in the present case, a person had been injured by the negligence of the driver of one of the pickup trucks speeding from the scene of the attack, he would also be entitled to sue under the statute's aegis.

The Ninth Circuit has considered this reading of the statute and rejected it.[58] The only authority cited for the creation of

56. *Compare* Slip op. pages 15460–15461, pages —— - —— *supra with* the panel opinion, *Scott v. Moore*, 640 F.2d 708, 718 (1981) (the class composed of "nonunion workers and their employers . . . falls within the statute's protective ambit").

57. Slip op. pages 15460–15461, pages —— - —— *supra*.

58. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720-21 (9th Cir.) ("The law of this circuit is clear: the plaintiff must be a member of the class discriminated against to claim the benefits of § 1985(3)."), *cert. denied*, —— U.S. ——, 102 S.Ct. 510, 70 L.Ed.2d 383 (1981); *Briley v. California*, 564 F.2d 849, 858-59 (9th Cir. 1977); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 (9th Cir. 1975).

this penumbra is the dissenting opinion of Justice White in *Novotny*.[59]

The majority opinion in *Novotny* held, however, that § 1985(3) created no new rights but is remedial in nature, and rejected Justice White's view. The majority here finds a substantive cause of action in the statute for non-class members. This is not only, we submit, a misreading of the statute, but also a rejection of the authority by which we are bound.

E. The Constitutional Question: The Source of Congressional Power

The Supreme Court recognized in *Griffin* that § 1985(3), if applied literally to every situation apparently embraced by it, might in some applications exceed Congress's authority.[60] Therefore, as the majority opinion recognizes, "a source of congressional power must be identified to warrant application of the statute in each case."[61] Our colleagues accurately describe the controversy concerning "the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct."[62] Pretermitting that issue, they find authority for the present application of § 1985(3) in the commerce power.[63]

Although the *power* of Congress under the commerce clause is broad enough to permit it to reach any private conspiracy

59. Novotny, a male, was a loan officer and member of the Savings and Loan Association's Board of Directors. He alleged that when he "expressed support for the female employees at a meeting of the board of directors, his connection with the Association abruptly ended." 442 U.S. at 370, 99 S.Ct. at 2347, 60 L.Ed.2d at 962. The en banc court of appeals for the Third Circuit held that Novotny was injured as a result of the conspiracy motivated by an invidious animus against women and had standing to bring suit under § 1985(c). 584 F.2d 1235, 1244-45 (3d Cir. 1978) (en banc). The Supreme Court majority did not, however, address this issue.

Justice White in his dissent stated: "Because § 1985(3) provides a remedy for *any person* injured as a result of deprivation of a substantive federal right, it must be seen as itself creating rights in persons other than those to whom the underlying federal right extends." 442 U.S. at 390, 99 S.Ct. at 2358, 60 L.Ed.2d at 975.

60. *Griffin v. Breckenridge*, 403 U.S. at 104, 91 S.Ct. at 1799, 29 L.Ed.2d at 349.

61. Slip op. page 15462, page —— *supra*.

62. Slip op. page 15462, page —— *supra*; *see* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1359 (1964); Wildman, *42 U.S.C. § 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 San Diego L.Rev. 317 (1980); *A Construction of Section 1985(3)*, *supra* note 17, at 440; Note, *The Troubled Waters of Section 1985(3) Litigation*, 1973 Law & Soc.Ord. 639; Comment, *Private Conspiracies to Violate Civil Rights*, 90 Harv.L.Rev. 1721, 1722 n.11 (1977). *But see* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 Colum.L.Rev. 449, 516-17 (1974).

Compare United States v. Guest, 383 U.S. 745, 783, 86 S.Ct. 1170, 1191, 16 L.Ed.2d 239, 263 (1966) (Brennan, J., concurring) *and Action v. Gannon*, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc) *with Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) *and Retail Clerks Local 770 v. Retail Clerks Int'l Ass'n*, 359 F.Supp. 1285, 1287 (C.D.Cal.1973).

63. We would hold that the fourteenth amendment permits Congress to enact the statute if the statute is interpreted as we have suggested it should be: to provide a remedy for private conduct designed to deny a citizen equal protection of the laws because of his membership in a class that is protected by the fourteenth amendment. The class of persons who want to work for a nonunion employer, however, is not thus protected by the fourteenth amendment. We consider, therefore, the question whether Congress relied on the commerce clause in enacting the statute.

designed to affect interstate commerce,[64] Congress assuredly did not rely on the commerce clause in enacting § 1985(3). The statute does not invoke the commerce clause, nor does it distinguish between conspiracies that affect interstate commerce and those whose aim is solely intrastate.

The debates of the 1871 Congress focused on the constitutional power of Congress under the thirteenth, fourteenth, and fifteenth amendments. *Griffin* found congressional power also in the constitutional protection afforded interstate travel.[65] The Forty-Second Congress, accustomed to a narrow construction of the commerce clause[66] and seeking to reach conspiracies that denied equality whether or not interstate commerce was implicated, never considered the commerce clause as its authority.

When the Congress has relied upon the commerce clause, it has either defined the necessary commerce impact in the statute or given authority to an administrative agency to define the triggering amount of interstate commerce. Thus, in some instances, Congress has sought to reach every transaction "affecting" interstate commerce.[67] In other instances, Congress has exerted power only when there is a prescribed volume of interstate transactions.[68] There are no such indications of congressional intent here and no statutory guides for the quantum of interstate activity necessary to activate the statute.

The majority appears to assume that Congress intended to authorize a remedy for any conspiracy that might affect interstate commerce. The limits of that interstate impact must be spelled out by future decision. They also find authority to protect interstate workers, but that could scarcely justify application of the statute to Scott and Matthews, both of whom are Texans.

F. Reconfining the Genie

Recognizing implicitly that they have released a brand new federal tort, our colleagues attempt in dicta to enclose this genie in a larger bottle. They say that they would not extend § 1985(3) to *every* kind of unlawful conduct, only to the limited instance where "there is no campaign to organize employees *and* force or violence is used to stake out one group's territorial claim and to deprive other workers and

64. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

65. 403 U.S. at 105, 91 S.Ct. at 1800, 29 L.Ed.2d at 350.

66. *E.g., United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 19 L.Ed. 593 (1870) (invalidating federal statute because the commerce clause was a denial of power to interfere with internal trade and business of the States); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1869) (holding insurance contracts not to be articles of commerce). "'Relatively little emerges up to the death of [Chief Justice] Waite in 1888, regarding the Court's attitude towards the commerce clause as an affirmative instrument for promoting "commerce among the states." The preoccupation [of earlier periods] is with the restrictive use of the clause.'" J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 134 (1978) (brackets in original) (quoting F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 7 (1964) (first published 1937).

67. *See* cases cited in note 64 *supra*.

68. *E.g.*, 29 U.S.C. § 203(s) (Supp. IV 1980) (defining an enterprise engaged in commerce for purposes of the Fair Labor Standards Act as, *inter alia*, an enterprise whose annual gross volume of business is not less than $250,000).

their employer of the right to freely associate with one another."[69] We see no basis in the statute for distinguishing violent unlawful conduct from other kinds of unlawful activity such as unfair labor practices, secondary boycotts, and criminal libel, or, indeed, criminally reckless driving. The rationale of the decision cannot be thus confined save by ipse dixit. If the decision is based on principle, and not like Justice Robert's railway ticket, "good for this day and train only,"[70] it extends logically not only to a multitude of "classes" having some sort of economic or "associational" tie but protects each member of those classes against any kind of unlawful conduct that results in bodily injury, or even, perhaps, economic harm.

III. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

The majority holds that the existence of a conspiracy on the part of some of the unions to interfere with the constitutional rights of the plaintiffs in this case can properly be established by a preponderance of the evidence. They conclude that, because no labor dispute existed, the clear proof standard required by § 6 of the Norris-LaGuardia Act should not be applied.[71] Part I of this opinion demonstrates that this case does involve a labor dispute within the meaning of the Norris-LaGuardia Act, thus compelling the application of the more rigorous standard of proof required by the Act.

Section 6 of the Act was added to overturn decisions holding unions liable in damages for the unlawful acts of their members, and members liable for the unlawful acts of other members.[72] The Act does not immunize unions from liability but it does protect them "against liability for unauthorized illegal acts" committed during a labor dispute except upon *clear proof* of authorization.[73] In *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1133, 16 L.Ed.2d 218, 234 (1966), the Supreme Court held that the clear proof standard applies even when federal courts are adjudicating claims against unions based on state law.[74]

Under *Gibbs*, an allegation that a union has adopted a strategy of violence and in-

69. Slip op. page 15461, page —— *supra* (emphasis added).

70. *Smith v. Allwright*, 321 U.S. 649, 669, 64 S.Ct. 757, 768, 88 L.Ed. 987, 1000 (1944) (Roberts, J., concurring).

71. Section 6 of the Norris-LaGuardia Act provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon *clear proof* of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106 (emphasis added).

72. *United Bhd. of Carpenters & Joiners v. United States*, 330 U.S. 395, 404, 67 S.Ct. 775, 780, 91 L.Ed. 973, 983 (1947).

73. *Id.* at 404, 407, 67 S.Ct. at 780, 781, 91 L.Ed.2d at 983, 984.

74. The employer there had attempted to open a mine with miners belonging to a union rival of the United Mine Workers Union. Armed members of the UMW then forcibly prevented the opening of the mine, threatened the employer, and beat an organizer for the rival union. The mine was kept closed by peaceful picketing. Gibbs, the supervisor of the mine, sued for damages caused by the illegal activity. The Supreme Court held that damages flowing from the violence used to close the mine could be recovered under state law, but the Court specifically required use of the clear proof standard.

timidation to achieve labor goals is not sufficient to preclude application of the Norris-LaGuardia Act and its exacting standard of proof. As the Court there said, one of the central purposes of the Act is to insulate unions from liability for unauthorized violent sprees of the union membership. "The driving force behind § 6 . . . was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." *Id.* at 736–67, 86 S.Ct. at 1144, 16 L.Ed.2d at 233–34.

The Court today strips unions of the protection that Congress sought to give them when a violent act occurs in a conflict engendered because of an employer's labor policies. There was enough evidence to sustain, as not clearly erroneous, a finding by the fact trier under the preponderance of evidence standard that the unions were responsible for the assault. The unions were entitled, however, to have the clear proof standard applied.

This conclusion is not inconsistent with finding the unions guilty of unfair labor practices under the NLRA. To implement later-developed national labor policy, Congress adopted a different standard for cases arising under the NLRA—preponderance of the evidence, § 10(c), 29 U.S.C. § 160(c). This standard is also required in the limited situations in which private damage suits may be brought for violations of the NLRA, *see* § 301(e), 29 U.S.C. § 185(e). In all other instances, including those present here, the standard of the Norris-LaGuardia Act stands unmodified. The district court applied the wrong burden of proof and it follows inexorably that its decision must be reversed. We would go further and hold that the evidence was insufficient to warrant a finding of liability under the correct standard.

IV. CONCLUSION

This is not the kind of hard case that ought to lead us into making new law. Section 1985(3) was adopted to provide a federal forum for those who could find no redress in state courts. Today, the majority extend the statute to embrace conduct condemned by state law. State tort law offered adequate redress for the damages. Injunctive relief at private instigation was available in state court. State criminal law has prosecuted the offenders. Federal injunctive relief was obtained by federal administrative intervention. Neither indignation at criminal conduct nor sympathy for its victims should lead us to disregard the Norris-LaGuardia Act or misconstrue § 1985(3). Therefore, we respectfully dissent.

R. LANIER ANDERSON, III, Circuit Judge, dissenting:

I join Parts I and III of the dissent authored by Judges Rubin and Williams. Having thus concluded that the district court erred in granting the injunction (Part I) and that there is not sufficient evidence to support the judgment when tested under the proper standard of proof (Part III), I find it unnecessary to reach the very difficult issues discussed by Judges Rubin and Williams in Part II. While I probably agree that the evidence in this case did not establish the necessary "class-based, invidiously discriminatory animus," I have reservations concerning the broader implications of Part II of the dissent of Judges Rubin and Williams.

GARWOOD, Circuit Judge, dissenting.

I respectfully dissent and join in Parts II A ("The Nature of the Right for Which

§ 1985(3) Provides a Remedy") and II E ("The Constitutional Question: The Source of Congressional Power") of the dissenting opinion authored by Judges Rubin and Williams.

In my opinion, the phrase "equal privileges and immunities under the laws" in the first clause of section 1985(3) refers to those rights that the United States Constitution protects against interference by private action (as well as from impairment by state action), such as the right to be free of the badges of slavery as secured by the Thirteenth Amendment and the right to interstate travel. In other words, this phrase applies to rights that have no "state action" requirement. The majority concedes that such rights are not involved here. On the other hand, the phrase "the equal protection of the laws" in the first clause of section 1985(3), repeating verbatim the concluding words of Section 1 of the Fourteenth Amendment, would seem to refer to rights that the United States Constitution protects only against deprivation by some kind of state action or inaction. This is not to say that a private conspiracy cannot deprive a party of the equal protection of the laws; but the object of the conspiracy must be to, "directly or indirectly," in some manner bring about a situation where the *protection of the law* is unequally afforded or applied to the victim. I believe this construction accords with the wording of the Ku Klux Klan Act, with its title ("An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes"), and with both the operative intent and the constitutional understanding of those in the Forty-Second Congress who supported the Cook-Willard limiting amendment.

The overall purpose of this amendment was plainly to prevent the Act from becoming a kind of national tort law and to keep it from transgressing the perceived limitations on the power of Congress. While certainly one method of accomplishing this purpose was the imposition of a class based animus requirement, this was not the only method. The amendment also reflects its proponents' recognition that, with but few exceptions, the rights of citizens are protected by the United States Constitution only against governmental invasion. While with respect to such rights Section 5 of the Fourteenth Amendment was doubtless understood by the proponents of the Cook-Willard amendment as allowing Congress to prohibit private conduct designed to, directly or indirectly, deny the protection thus afforded by the United States Constitution, Section 5 was not understood as allowing Congress to change the ultimate nature of what the United States Constitution protected those rights against, namely governmental misfeasance or nonfeasance. This understanding is reflected, for example, in the remarks of Congressman Burchard, quoted in the opinion of Judges Rubin and Williams, Slip op. at 15479–15480, at —— *supra*, that the Act as amended condemned conspiracies

> "designed to prevent the equal and impartial administration of justice.... The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection."

As stated in *A Construction of Section 1985(c)*:[1]

1. Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U.Chi.L. Rev. 402 (1979).

"The language of *equal* protection and *equal* privileges and immunities was added as a limitation, not as an expansion. The fundamental congressional purpose was to prevent private conspiracies from taking over the government, or from affecting the political environment so as to inhibit state authorities from according equal protection to their citizens." *Id.* at 436. (Footnote omitted) (emphasis in original.)

While section 2 of the Ku Klux Klan Act also prohibits conspiracies "for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws," this clause is distinct from the "for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws" clause in at least two respects. The former clause refers to "all persons within such State," while the latter speaks of "any person or any class of persons." Moreover, the last-quoted clause has the expansive modifier "either directly or indirectly," while the first-quoted clause does not. As pointed out in this connection in *A Construction of Section 1985(c)*:

"It would be a mistake to read this legislative intent as limited to *direct* interference with government provision of equal protection.... The Ku Klux Klan was a political conspiracy; its depredations frequently involved no component of direct obstruction of officials. The Klansmen's object was to seize control of state governments, to reverse the process of reconstruction, and to nullify the rights recently conferred upon the freedmen by the thirteenth, fourteenth, and fifteenth amendments. Their primary weapon was political terror, directed especially against those whose votes and efforts sought to bring about just and impartial state administration. In this way they hoped to make it politically impossible for the states to accord equal protection. The moderates who drafted the statute were careful not to curtail the effect of the general clause of section 2 by words such as 'obstructing a governmental official.' Rather, they employed the phrase 'directly or indirectly' to insure that the statute would reach the schemes of conspirators designed to block equal protection by indirect and political means." *Id.* at 419–20. (Emphasis in original.)

In my opinion this analysis is not contrary to either the holding or the *ratio decidendi* of *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The views expressed in this dissent are essentially those espoused in the concurring opinion of Justice Stevens, with which Justice Powell agreed, in *Great American S. & L. Assn. v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 2353, 60 L.Ed.2d 957 (1979) (Stevens, J., concurring). Neither Justice Stevens nor Justice Powell appear to consider their views in this regard as being at variance with *Griffin*, nor does the majority opinion in *Novotny* indicate that these concurrences misread *Griffin*. Indeed, the statement by the *Novotny* majority that "[s]ection 1985(c) provides no substantive rights itself," 442 U.S. at 372, 99 S.Ct. at 2349, 60 L.Ed.2d 963, supports the analysis here made, namely that the Forty-Second Congress designed the Ku Klux Klan Act to guard against subversion of those rights secured to citizens by the United States Constitution. It did not create new substantive rights.

Moreover, I believe the appropriate reading of *Griffin* is that stated as follows in *A Construction of Section 1985(c)*:

"The Court's decision that the acts alleged in *Griffin* stated a section 1985(c) cause of action accords with the original purpose of the statute. The defendants in *Griffin* assaulted the plaintiffs on the highway on the mistaken impression that the driver was a civil rights worker. There was no hint of state action in any of the three possible forms: no state officers were involved by action or inaction, no state authorities were coerced, influenced, or impeded in the performance of their duty toward the plaintiffs, and no conspiracy existed so massive as to supplant state authority. Nevertheless, the purpose of the defendants was in part to drive civil rights workers from the state, and thereby to make it less likely politically that the state would carry out its duty of equal protection to blacks. This purpose falls squarely within the scope of conspiratorial designs that prompted the Forty-Second Congress to pass the Ku Klux Klan Act.

". . . .

". . . The Court's holding does not suggest that conspiracies of a wholly different purpose and effect from those motivating the framers of the statute—for example, private acts of discrimination in employment—are also within the statute's reach. The *Griffin* Court insisted as much by expressly recognizing the necessity of 'giving full effect to the congressional purpose' by restricting the scope of the action in the manner intended by the sponsors of the 'limiting amendment.' In order to decide the *Griffin* case, it was not necessary to explore the *full* extent of the limiting amendment—the requirement of discriminatory animus sufficed for *Griffin's* purposes—but the opinion endorses, in principle, the restriction of section 1985(c) in accordance with its extensive legislative history." *Id.* at 425–27. (Footnotes omitted) (emphasis in original.)

In this case there is not only no evidence that these defendants had the purpose of denying plaintiffs any of those rights that the United States Constitution secures against private (or public) abridgement (such as the right to be free of the badges of slavery or to travel interstate), but there is also no evidence of any purpose to directly or indirectly deny plaintiffs the *protection of any laws*. There not only was no direct interference with law enforcement, there was no suggestion that defendants were attempting to prevent plaintiffs from exercising or achieving any political influence or governmental power or to create a climate of opinion or situation in which governmental authorities would be unwilling or unable to protect plaintiffs in the exercise of their legal rights or to afford plaintiffs equal governmental treatment or protection.

Nor, in my view, has there been any showing of the requisite class based animus. While I agree with the majority that a purely racial animus is not the only class based animus reached by the Ku Klux Klan Act, I nevertheless believe that the animus reflected in this case is far removed from that which the Act intended to protect against. As one of the above-quoted passages from *A Construction of Section 1985(c)* correctly observes:

"The klansmen's object was to seize control of state governments, to reverse the process of reconstruction, and to nullify the rights recently conferred upon the freedmen by the thirteenth, fourteenth and fifteenth amendments. Their primary weapon was political terror, directed especially against those whose votes

> and efforts sought to bring about just and impartial state administration."

The Ku Klux Klan Act, of course, was designed to combat such phenomenon. Consistent with this evident design, I would require that the animus, whether directed at individuals or a class, be related in some manner to race (or perhaps some other analogously immutable class characteristic). Under this theory, the Act would also extend to those harmed either because of their actual or perceived, present or potential, allegiance with a discriminated-against race (or similar class) or because of their efforts to secure on behalf of such race (or similar class) the rights which the United States Constitution guarantees against governmental denial on account of race (or similar characteristic) or the rights, such as freedom from the badges of slavery, which the United States Constitution protects against private infringement.

I do not denigrate the right of individuals not to belong to unions, nor do I suggest that the right to work on a job not restricted to union members is unworthy of protection against unlawful interference. And, I cannot accept the proposition that there has been no significant discrimination or violence against nonunion workers. But it is plain to me that this was not the sort of discriminatory deprivation of rights that the Ku Klux Klan Act was designed to prevent.

I also agree with Judges Rubin and Williams that, for the reasons stated by them, the majority errs in its reliance on the commerce clause as a source of congressional power to enact the Ku Klux Klan Act, so as to reach purely private conspiracies directed at purely private ends unrelated to rights protected by the United States Constitution. Such reliance at least indirectly undermines the majority's reading of congressional intent concerning the scope of section 1985(3). At the very least, reliance on the commerce clause bespeaks a serious doubt as to the existence of any other source of congressional power sufficient to support the Ku Klux Klan Act as interpreted by the majority. We are cited to no legislative history, or other contemporary evidence, that Congress intended to invoke its power under the commerce clause, and it is beyond dispute that congressional power under this clause was then considered far more limited than it is today. Accordingly, since Congress did not purport to act under the commerce clause and yet considered it was acting constitutionally, a strong inference arises that Congress did not intend the Ku Klux Klan Act to have the broad reach ascribed to it by the majority.

Moreover, we are cited to no decision of the Supreme Court that has sustained under the commerce clause an act of Congress not by its terms directed at interstate or foreign commerce, or matters affecting them, or expressly stated to be enacted pursuant to the power to regulate commerce. To do so when the legislative history, and other contemporary evidence, plainly indicate that Congress was relying on other constitutional sources of power, seems to me to be a most serious error. To regulate only conduct in or affecting interstate commerce is quite a different proposition from regulating conduct irrespective of its relation to interstate commerce. Under Section 8 of Article I, it is Congress, not the courts, that is given the "power" "to regulate commerce." When the courts "sustain" under the commerce clause an act of Congress plainly *not* intended as an exercise of the power to regulate commerce, an act *not* limited to conduct in or affecting commerce but rather applying equally to conduct

within and without the scope of the commerce power, then the courts have made the decision, which the Constitution committed to Congress, to regulate interstate commerce. The majority relies on Chief Justice Marshall's classic formulation in *McCulloch v. Maryland*, 4 Wheat 316, 421, 4 L.Ed. 579, 605 (1819), but overlooks the import of the opening phrases, "Let the end be legitimate, let it be within the scope of the constitution...." Here, the "end" which Congress sought to achieve was *not* the regulation of commerce. It stands *McCulloch v. Maryland* on its head to say that an "end" not intended by Congress, and which Congress was not required to intend, can be used to sustain, and in sustaining to transform, an act of Congress taken in the exercise of distinctly different constitutional powers.

Concluding, for the above-referenced reasons, that plaintiffs have no cause of action under 42 U.S.C. § 1985(3), I find it unnecessary to reach the other issues addressed in the majority opinion and in the dissent of Judges Rubin and Williams.

APPENDIX B

Paul E. SCOTT et al., Plaintiffs-Appellees,

v.

Bill MOORE et al., Defendants,

Laborers International Union of North America, Local No. 870 et al., Defendants-Appellants,

International Union of Operating Engineers, etc., AFL-CIO, Local 450, Defendant-Appellant.

No. 79-1196.

United States Court of Appeals, Fifth Circuit.

March 26, 1981.

Construction company and two of its employees brought action against trades council, its unions, and individual union members, alleging that defendants conspired for purpose of depriving plaintiffs of equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on construction site. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., entered judgment in favor of plaintiffs, and defendant appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) anti-injunction provisions of Norris-LaGuardia Act did not deprive district court of jurisdiction to enjoin violence; (2) civil rights conspiracy statute encompassed conspiracy designed to deprive nonunion workers and their employer of First Amendment right to freely associate with one another where conspiracy did not occur in conjunction with legitimate union activity and it was perfected by force and violence; (3) commerce clause empowered Congress to reach the private conspiracy; (4) unions were not involved in a "labor dispute" and thus clear proof standard of Norris-LaGuardia Act did not apply, and (5) district court's findings that three union locals authorized or participated in the conspiracy were not clearly erroneous, but evidence of participation in conspiracy was insufficient with respect to other eight unions.

Affirmed in part and reversed in part.

1. Labor Relations ⇐855

Norris-LaGuardia Act was passed for the purpose of limiting circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute; Act was predicated on the conviction that labor disputes turn on issues of social and economic policy that cannot appropriately be resolved by the courts. Norris-LaGuardia Act, §§ 1 et seq., 5, 29 U.S.C.A. §§ 101 et seq., 105.

2. Labor Relations ⇐866, 867

Norris-LaGuardia Act does not deny to federal courts power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons participating or interested in a labor dispute. Norris-LaGuardia Act, §§ 4, 5, 7, 7(a), 29 U.S.C.A. §§ 104, 105, 107, 107(a).

3. Labor Relations ⇐870

Norris-LaGuardia Act did not deprive district court of jurisdiction to order trades council, 24 of its union members, and individual coconspirators not to combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1981, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

possession of any person or his family who may work upon, travel to, deliver materials, goods or services to nonunion employer or employer's construction site. Norris-LaGuardia Act, §§ 4, 5, 7, 7(a), 29 U.S.C.A. §§ 104, 105, 107, 107(a).

4. Conspiracy ⇐7.5

Five elements necessary for a plaintiff to establish cause of action under civil rights conspiracy statute are: (1) that defendants must conspire or go in disguise on highway or premises of another; (2) for the purpose of depriving any person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws; (3) one or more of the conspirators must commit some act in furtherance of the conspiracy; (4) whereby another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States; and (5) conspirators' conduct must be unlawful independent of violation of civil rights conspiracy statute. 42 U.S.C.A. § 1985(3).

5. Constitutional Law ⇐274.1(1)

Guarantees afforded by First Amendment are protected by due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14.

6. Constitutional Law ⇐91

Right of free association is closely aligned with right of free speech and is similarly protected by First Amendment. U.S.C.A.Const. Amend. 1.

7. Conspiracy ⇐7.5

Civil rights conspiracy statute was intended to provide remedy for entirely private conspiracies. 42 U.S.C.A. § 1985(3).

8. Conspiracy ⇐7.6

Civil rights conspiracy statute can, under certain circumstances, afford remedy for purely private conspiracies aimed at denying their victims the First Amendment right of free association. U.S.C.A.Const. Amend. 1; 42 U.S.C.A. § 1985(3).

9. Conspiracy ⇐7.6

Civil rights conspiracy statute is not restricted to protecting victims of racial discrimination but, rather, includes conspiracy motivated by nonracial class animus. 42 U.S.C.A. § 1985(3).

10. Conspiracy ⇐7.6

Civil rights conspiracy statute encompasses conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where the conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. 42 U.S.C.A. § 1985(3).

11. Conspiracy ⇐7.5

Not every conceivable class of persons is covered by civil rights conspiracy statute; members of plaintiff class must share some common characteristics beyond simply being victims of defendant's conspiratorial conduct, and class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. 42 U.S.C.A. § 1985(3).

12. Conspiracy ⇐7.6

Plaintiffs, nonunion employer and its nonunion employees who alleged injury resulting from conspiracy motivated by defendants' hostility toward nonunion workers and employers who hire them,

constituted a class under civil rights conspiracy statute. 42 U.S.C.A. § 1985(3); National Labor Relations Act, §§ 1 et seq., 7, 8(b)(1) as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(b)(1).

13. Conspiracy ⇐7.6

Civil rights conspiracy statute cannot be invoked to disrupt operation of carefully integrated statutory scheme, nor can cause of action under statute be predicated upon simple unfair labor practice; unionism or nonunionism in and of itself does not create a covered class under statute, but where there is no campaign to organize employees and force or violence is used to deprive nonunion workers and their employer of a right to freely associate with one another, action will lie under civil rights conspiracy statute. 42 U.S.C.A. § 1985(3).

14. Commerce ⇐74.65

Commerce clause justified application of civil rights conspiracy statute to defendants' conspiracy, which was motivated by hostility against nonunion employees and their employer where employer was general contractor which, during year preceding violent attack on its construction site had performed work outside of Texas valued in excess of $300,000, where employer had purchased over $50,000 worth of goods and materials which originated outside of Texas and where construction contract was with United States Army Corps of Engineers, even though volume of business done outside of Texas was small compared to total amount of services and goods in interstate commerce. 42 U.S.C.A. § 1985(3); U.S.C.A.Const. Art. 1, § 8, cl. 3.

15. Commerce ⇐3

Under commerce clause, judicial inquiry is limited to asking whether Congress has rational basis for finding chosen regulatory scheme necessary to the protection of commerce; it is not constitutionally relevant that Congress was actually legislating against moral wrongs when it enacted provisions in question. U.S.C.A.Const. Art. 1, § 8, cl. 3.

16. Labor Relations ⇐766

Under Norris-LaGuardia Act section providing that no officer or member of union and no union participating in or interested in labor disputes shall be held liable for unlawful acts of individual officers, members or agents without clear proof of actual participation in or actual authorization of such acts or ratification thereof after actual knowledge thereof, Congress intended to require clear, unequivocal and convincing proof of union involvement in unlawful conduct to impose liability for it. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

17. Labor Relations ⇐766

While Norris-LaGuardia Act section requires prior to imposition of liability as to union clear and convincing evidence as to union authorization of, participation in, or ratification of acts allegedly performed by its members, it does not prescribe different standard of proof for other issues in actions against union or its officers or members involved in a labor dispute. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

18. Statutes ⇐184, 208

In construing any congressional enactment, it is necessary to interpret meaning of words as they are used in relation to setting in which they are written, with due regard to mischief which legislation was designed to remedy.

19. Labor Relations ⇐766

Where, at time defendants allegedly conspired to attack construction site, no union had collective bargaining agreement with employer and none was seeking recognition as collective bargaining representative, and no union was staging an informational picket to publicize employer's employment practices, and where attack on construction site was not associated with any ongoing legitimate union conduct, unions were not participating in a "labor dispute," and thus clear proof standard of Norris-LaGuardia Act did not apply in suit against unions. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

See publication Words and Phrases for other judicial constructions and definitions.

20. Labor Relations ⇐881

Under Norris-LaGuardia Act, a "labor dispute" exists where unlawful conduct occurs in conjunction with some legitimate union activity, and "labor dispute" may also exist even though otherwise legitimate union conduct is unlawful under some other statutory scheme. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

21. Federal Courts ⇐858

In suit brought under civil rights conspiracy statute against various unions and others arising out of an attack on plaintiffs' construction site allegedly motivated by hostility against nonunion employer and its employees, district court's finding of involvement in conspiracy was clearly erroneous with respect to certain unions, whose only contact with assault on construction site was their attendance at trades council meeting prior to the assault, but finding was not clearly erroneous with respect to three union locals, in view of evidence connecting union business representatives to the attack on the construction site. 42 U.S.C.A. § 1985(3).

22. Federal Courts ⇐852

Where "clearly erroneous" standard applies, appellate court must be especially reluctant to disregard factual finding based upon evaluation of testimony that draws credibility into question; it may not consider the evidence anew, and merely because it might have reached a different result on the same evidence will not justify its setting district court's findings aside. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

Appeals from the United States District Court for the Eastern District of Texas.

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This appeal presents important questions concerning the scope of relief available under 42 U.S.C. § 1985(3), the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between section 1985(3) and the labor relations laws. The district court issued a permanent injunction against the defendants, including numerous labor organizations. It also awarded money damages for violations of section 1985(3), concluding that the statute afforded a remedy for the kind of private conspiracy involved here and that Congress was constitutionally empowered to provide such a remedy. For the reasons stated below, we affirm in part and reverse in part.

I. THE FACTUAL BACKGROUND

This case arises out of an episode of mob violence that occurred in the early morning hours of January 17, 1975. The plaintiffs are A. A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions. The individual defendants are not parties to this appeal. The plaintiffs contend that the defendants conspired for the purpose of depriving them of the equal protection of the laws and equal privileges and immunities under the law when they planned and executed an attack on the Cross construction site, assaulting workers and destroying property.

A. A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur. The agreement had a contract price in excess of $8 million and called for the construction of the pump station with four pumps and a gravity drain for flood control. In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.

Cross Construction Company's hiring practices provoked an antipathetic response from some segments of the Port Arthur community. In fact, on several occasions prior to the eruption of violence on January 17, popular enmity had risen to the level of warnings and threats directed against Cross and its employees. Local residents had confronted Cross employees at a local tavern and pool hall frequented by them, threatening to place pickets at the construction site, promising to make Cross "go union," and occasionally warning of trouble if Cross did not cease hiring nonunion laborers. About three months before the January 17 attack, one of the individual defendants, Bill Moore, approached Mr. Cross and threatened that he would "hurt you bad," saying, "What is going to happen when that big rig of yours down there burns up?" On another occasion, John Wallace, financial secretary and business representative for the Carpenters Local # 610, had told Cross that "this is union country" and that if he persisted in using nonunion labor it was "going to cost you a million dollars."

Meanwhile, during the months preceding the January 17 violence, rumors began to develop concerning a "citizens protest" to be staged at the Alligator Bayou construction site. These rumors contemplated a public demonstration to call attention to the fact that Cross hired nonunion labor and did not have a labor contract with any union as well as to protest the company's policy of hiring employees from outside the Port Arthur community.

There is no direct evidence to show the organizing force behind the protest demonstration, but on Wednesday, January 15, two days before the assault on the Cross jobsite, the Sabine Area Building Trades Council held its regular weekly meeting. Cross Construction Company's indifference to prospective employees' union status and its lack of a union contract had long been topics of concern at the Council's meetings, and they were once again discussed during the January 15 session. In addition, the group discussed the rumored citizens protest, and some of the union representatives in attendance informed the Council that the demonstration had apparently been scheduled for the following Friday.

On Thursday, the sixteenth, Cross Construction Company learned of the scheduled protest from two union employees associated with the Alligator Bayou project. Fred Dukes, a member of Cement Masons Local 884, worked for Cross as a cement finisher on a two-day job. Earl Stevens, a member of Plumbers Local 504, worked as a foreman for Cross Construction Company's mechanical subcontractor. Both men received warnings from their respective union business agents about a possible picket or demonstration to be held at the Cross construction site, and both men passed that information along to Cross. Neither Dukes nor Stevens had heard anything about violent or destructive conduct. Nevertheless, Cross directed its employees to report for work at 6:00 a. m. on Friday, an hour earlier than usual, in order to avoid any confrontation between them and the demonstrators.

On the morning of January 17, after most of the Cross employees had arrived at work, a crowd of nearly three hundred people assembled at the main access road leading to the Cross construction site. Several vehicles made brief forays up the access road, and their occupants confirmed with Cross and Scott that they were at the Cross Construction Company jobsite. The crowd began to get unruly, pushing and shoving the remaining Cross workers as they arrived. Nevertheless, Cross's employees began work as usual. Then, shortly after 7:00 that morning, a group of four pickup trucks, each carrying between twelve and eighteen persons, emerged from the crowd gathered at the access road and drove onto the jobsite. Plaintiff Scott went out to meet the intruders and to request them to leave the area, but one of them approached Scott and said, "Man, you all have got to be crazy . . . this is a union town." Scott told his interlocutor that they did not want any trouble, and he attempted to gather together the other employees and to leave the jobsite. However, before he could complete his mission, someone stepped out of the group and struck him on the head. Suddenly, the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment. The entire episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U. S. Army Corps of Engineers.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. They sought and obtained a temporary injunction retraining the then-named defendants and "all persons, firms, and associations combining or conspiring with defendants" from further violent, intimidating, or destructive acts against employees at the Alligator Bayou Pump Station project. Nearly two years later, the plaintiffs amended their complaint, adding A. A. Cross Construction Company, Inc., as plaintiff and the Sabine Area Building and Construction Trades Council along with twenty-five local unions as defendants. The district court found that the plaintiffs had proved a conspiracy to deprive them of the equal protection of the laws, permanently enjoined the building trades council and twenty-four of the unions from future misconduct, and assessed damages against eleven of the union defendants.[1]

II. THE JURISDICTIONAL QUESTION: INJUNCTIVE RELIEF AND THE NORRIS LAGUARDIA ACT

The district court issued a permanent injunction against the Sabine Area Building and Construction Trades Council, twenty-four of its member unions, and all persons conspiring with them. The court's injunction ordered that those parties subject to its terms

> . . . shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A. A. Cross Construction Co., Inc., or to the site of the alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

The defendants contest the district court's power to issue such an injunction, arguing that the Norris-LaGuardia Act deprives the district court of jurisdiction to enjoin labor organizations from engaging in conspiratorial conduct. They maintain that the unembellished language of the Act is sufficient to show the court's usurpation of authority.

[1] We disagree. The Norris-LaGuardia Act was passed for the purpose of limiting the circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute. The labor injunction had been an important device used by employers to counter organized labor's most effective economic weapons, strikes, boycotts, and picket lines. However, the Act was predicated on the conviction that labor disputes turned on issues of social and economic policy that could not appropriately be resolved by the courts. The legislative solution to

1. The district court assessed damages against the following eleven unions: Laborers International Union of North America, Local 870; Operative Plasters and Cement Masons International Association, Local 884; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195; United Brotherhood of Carpenters and Joiners of America, Local 610; United Brotherhood of Carpenters and Joiners of America, Local 753; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local 587; International Association of Bridge Structural and Ornamental Ironworkers, Local 125; Sheet Metal Workers International Association, Local 196; Carpenters District Council of Sabine Area; International Brotherhood of Electrical Workers, Local 479; and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL CIO, Local 450.

the problems confronting workers in a complex industrial economy was union organization and collective bargaining. Since the ready issuance of labor injunctions presented a serious obstacle to the concerted activities of organized workers, Congress decided to remove the federal judiciary from labor disputes. Thus, section 5 of the Act, 29 U.S.C. § 105, limits the equitable power of the federal courts in the following way:

> No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 105.

[2] But the Act does not impose an unqualified prohibition against federal injunctive relief. Section 105 merely restricts the court's power to enjoin concerted or conspiratorial activity where the conduct to be enjoined is an act enumerated in section 104.[2] The enumerated acts include refusing to work, joining a labor organization, paying or withholding strike benefits from a labor disputant, lawfully giving aid to a labor disputant who is prosecuting or defending a court action, truthfully and peacefully publicizing a labor dispute, peacefully assembling to promote one's interests in a labor dispute, and agreeing with or inducing other persons to do any of those acts. In short, section 104 interdicts injunctive relief against the legitimate activities of labor unions. However, there is nothing in this provision denying to federal courts the power to enjoin violence, breaches of the peace, or criminal acts simply because they may be committed by persons participating or interested in a labor dispute.

[3] In fact, the Norris-LaGuardia Act itself implicitly recognizes the threatened

2. Section 104 provides as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
>
> (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
>
> (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

29 U.S.C. § 104.

commission of violent acts as a condition under which an injunction may issue. Section 107 states that no court of the United States has jurisdiction to grant an injunction, unless, after a hearing, the court finds "[t]hat unlawful acts have been threatened and will be committed unless restrained . . ." 29 U.S.C. § 107(a). Thus, violence, intimidation, threats, vandalism and combinations or conspiracies to commit such acts may be restrained and enjoined even though they arise in connection with a labor dispute. *See, e. g., Westinghouse Broadcasting Co. v. Dukakis*, 412 F.Supp. 580 (D.Mass. 1976); *Potomac Electric Power Co. v. Congress of Racial Equality*, 209 F.Supp. 599 (D.D.C.1962). The Norris-LaGuardia Act does not divest the district court of jurisdiction to enjoin the kind of violent conduct present in this case.[3]

III. THE STATUTORY QUESTION: THE SCOPE OF REMEDY UNDER 42 U.S.C. § 1985(3)

A. *Griffin v. Breckenridge*

Section 1985(3) was originally enacted by Congress as a part of the Ku Klux Klan Act in order to enforce the Civil War amendments to the Constitution and to provide a means of redress for persons victimized by the Klan's acts of terror and intimidation. The statute imposes civil liability on persons conspiring to deprive another person or class of persons of "the equal protection of the laws, or of equal privileges and immunities under the laws."[4] Narrow judicial construction made section 1985(3) a seldom-used remedy during the first century after its enactment. *See, e. g., Collins v. Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951). However, the Supreme Court decided in 1971 to "accord to the words of the statute their apparent meaning" and held section 1985(3) provided a civil remedy for damages against wholly private infringements of constitutionally protected rights. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1795, 29 L.Ed.2d 338, 345 (1971). In *Griffin*, a group of whites assaulted three black men along a Mississippi highway in the mistaken belief that their victims were the associates of a civil rights worker. The blacks brought an action under section 1985(3) to redress violations of the laws of the United States and of Mississippi, including the rights of free speech, assembly, association, interstate travel, liberty, and security of their persons. The Supreme Court first held that the text of the statute, recent judicial inter-

3. Even where jurisdiction to grant injunctive relief is authorized, the Norris-LaGuardia Act imposes strict procedural requirements upon the court. *See* 29 U.S.C. §§ 107 109; *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 62, 58 S.Ct. 703, 707, 82 L.Ed. 1012, 1016 (1938). The unions have raised no objections to the procedures employed by the district court in this case.

4. The relevant part of section 1985(3) reads as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class or persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3)

pretations given to related civil rights provisions, the complementary relationship of the various civil rights statutes, and the legislative history surrounding section 1985(3) all "point unwaveringly to § 1985(3)'s coverage of private conspiracies." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.

[4] While eliminating the state action requirement, the *Griffin* court was concerned that the statute, if applied too broadly, would displace many areas of tort law that have traditionally been reserved to the states and thereby violate constitutionally-based principles of federalism. "That the Statute was meant to reach private activity does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." 403 U.S. at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347. Accordingly, the Court read section 1985(3) to apply only to actions which are inspired by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. It then delineated four elements necessary for a plaintiff to establish a § 1985(3) cause of action:

> (1) the defendants must conspire or go in disguise on the highway or premises of another;
>
> (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and
>
> (3) one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby
>
> (4) another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

See id. at 102-03, 91 S.Ct. at 1790, 29 L.Ed.2d at 348. Subsequently, this court has added a fifth element,

> (5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation.

See McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc).

The *Griffin* court, having concluded that the plaintiffs had stated a cause of action under section 1985(3), then sought to locate a source of congressional power to reach the private conspiracy alleged. The sources identified in *Griffin* were the Thirteenth Amendment and the constitutional right to travel. 403 U.S. at 104-06, 91 S.Ct. at 1799-1800, 29 L.Ed.2d at 349-50. The Court observed, however, that other provisions of the Constitution, including section 5 of the Fourteenth Amendment, might empower Congress to reach other conspiracies by private persons. *Id.* at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351. However, the Court found the facts of that case made it unnecessary to look beyond the Thirteenth Amendment and the right to interstate travel.

B. *The Present Case*

Griffin's principles indicate the plaintiffs here have made out a cause of action under section 1985(3). The facts of this case clearly embody four of the five elements essential to a successful § 1985(3) claim. First, the evidence is sufficient to establish a conspiracy among some of the Council's constituent unions and individual defendants. Second, proof that plaintiffs were assaulted, beaten, and threatened and that property was destroyed establishes the requisite "act in furtherance" of the conspiracy. Third, these

acts are indisputably illegal apart from § 1985(3) as required by *McLellan*. Fourth, there is evidence of personal injuries, property damage, and economic loss. The only element requiring analysis is the requirement that the conspiracy be for the purpose of depriving a person of the equal protection of the laws or equal privileges and immunities under the laws. This requirement, in turn, has two components: (1) the violation of some protected right and (2) a class-based, invidiously discriminatory animus motivating the violation.

1. *Violation of a Protected Right*

In *Griffin*, the Supreme Court stated that a § 1985(3) conspiracy "must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348. The plaintiffs in the case at bar contend that the object of the defendants' conspiracy was to deprive them of their First Amendment right to associate with their fellow nonunion employees. They argue that curtailment of their interests secured by the First Amendment is a deprivation of equal protection of the laws within the meaning of section 1985(3) as interpreted by *Griffin*.

[5, 6] The Ku Klux Klan Act was originally entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E. g., Williams v. Rhodes*, 393 U.S. 23, 30-31, 98 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan*, 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 704 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E. g., Abood v. Detroit Board of Education*, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798-99, 52 L.Ed.2d 261, 283 (1977); *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488, 1499 (1958).

The defendants urge that section 1985(3) does not provide a remedy for private interference with First Amendment freedoms. They appeal to the well-established principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminating or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 1180 (1948). To support their construction of section 1985(3), the defendants rely upon several decisions of the Seventh Circuit. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the court held that section 1985(3) does not afford protection against private deprivations of rights protected under the Fourteenth Amendment absent some kind of state involvement. Emphasizing the historical connection between sections 1983 and 1985(3), the court decided that it is necessary to identify the interests which Congress intended to protect from unequal treatment as well as the kinds of conduct which it meant to proscribe.

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's

> Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment. We think the § 1983 cases make it clear that in this third category a "state involvement" requirement must survive *Griffin*.

459 F.2d at 195 (footnotes omitted).[5] Subsequently the Seventh Circuit has extended the *Dombrowski* rationale in *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976), expressly holding that section 1985(3) provides no remedy for purely private impairment of First Amendment speech and associational freedoms. *Accord Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

[7] The Seventh Circuit's reasoning is contrary to the Supreme Court's analysis in *Griffin*. Of course, most basic constitutional provisions impose limitations on the power of government to regulate private conduct. Thus, the rights they confer on individuals are typically rights of the individual against the state. But the *Griffin* court, after acknowledging the conceptual difficulties associated with private deprivations of constitutional rights, construed section 1985(3) to reach both public and private constitutional wrongs.

> A century of Fourteenth Amendment adjudication has ... made it understandably difficult to conceive what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of "equal protection of the laws" and "equal privileges and immunities under the laws," *whatever their source*.

403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345 (citation omitted and some emphasis supplied). Thus, *Griffin* made it unmistakably clear that section 1985(3) was intended to provide a remedy for all private conspiracies. "It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101, 91 S.Ct. at 1798, 29 L.Ed.2d at 347.[6] The *Griffin* Court's method of analysis and the unequivocal language of its opinion foreclose our adoption of the approach taken by the Seventh Circuit.

In addition, the interpretation given to the statute in this circuit makes that approach unnecessary. Although *Griffin* found that section 1985(3) covered purely private conspiracies, it did not announce what might constitute a deprivation of equal protection by private persons. Un-

5. *Dombrowski* recognizes that there is no statutory requirement of state participation or support for the conduct of the conspirators, *i. e.*, that there is no requirement that the defendants act under color of state law. However, where one suffers a deprivation of a federally created right which necessarily includes some component of state action, *Dombrowski* holds that such state action is also a necessary ingredient of the section 1985(3) cause of action. *See* 459 F.2d at 194-95.

6. Technically, of course, this language is dicta. *Griffin* grounded its decision on the rights secured to black citizens under the Thirteenth Amendment and the right to inter state travel, both of which operate as limits on individual conduct as well as state conduct. However, we believe that the language and reasoning of *Griffin* on this issue are sufficiently indicative of the Supreme Court's approach to be regarded as dispositive.

certainty in this regard may have contributed to the Seventh Circuit's decision to retain some form of state involvement as a part of the § 1985(3) cause of action. *See Dombrowski*, 459 F.2d at 194. However, this circuit has adopted a different tact. *McLellan* establishes that section 1985(3) was not intended to redress every conceivable private interference with another's rights. Rather, "the object of a section 1985(3) conspiracy must be to deprive another of the enjoyment of legal rights by independently unlawful conduct." *McLellan*, 545 F.2d at 927 (footnote omitted). The independent illegality requirement was derived in part from the passage in *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883), which explains that the only method by which a "private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder." *Id.* at 643, 1 S.Ct. at 612, 27 L.Ed. at 295. In this way, *McLellan* limited the potentially boundless reach of the statute and provided meaning to the concept of a private impairment of constitutional rights. Therefore, *McLellan* resolved the difficulties perceived by the *Dombrowski* court and made its analysis unnecessary.

[8] It cannot be gainsaid that the defendants' conspiracy comprehended an intent to violate the law independent of section 1985(3). The plaintiffs contend that the conspiracy was calculated to deprive them of the right to freely associate with other nonunion laborers. They have alleged and have sought to prove that the defendants conspired to accomplish this object by assaulting and beating them with wooden boards and iron bars; by destroying tools, equipment, and automobiles; and by overturning and setting fire to the Cross office trailer. The means adopted by the conspirators to deprive the plaintiffs of their rights of free association encompass patent violations of both the civil and criminal laws of Texas. *See, e. g.*, Tex.Penal Code Ann. §§ 22.01 (assault); 22.02 (aggravated assault); 28.02 (arson); 28.04 (reckless damage or destruction) (Vernon 1974). *See generally* W. Prosser, Law of Torts §§ 9–10 (assault and battery); 14 (trespass to chattels). The plaintiffs also offered proof that the conspirators engaged in the very unlawful conduct they conspired to commit and that as a result plaintiffs suffered injury to their persons and property. Under such circumstances, we conclude that section 1985(3) affords a remedy for purely private conspiracies aimed at denying their victims the First Amendment right of free association.[7]

2. *Discriminatory, Class-Based Animus*

The plaintiffs have also satisfied *Griffin's* class-based, discriminatory animus component of the § 1985(3) cause of action. Our analysis involves two distinct but closely related questions. First, does section 1985(3) coverage extend to private conspiracies founded upon some in-

7. Because of our disposition of the case, it is not necessary to decide whether section 1985(3) also protects against private conspiracies to deny rights secured under state law. *See Life Insurance Company of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (holding violations of state antidiscrimination statute cognizable). It is also unnecessary to decide whether federal *statutory* rights are protected by § 1985(3). *See Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), *rev'd* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (violations of Title VII). *Cf. McLellan*, 545 F.2d 919 (5th Cir. 1977) (right to file bankruptcy petition not protected.)

vidiously discriminatory animus other than racial prejudice? Second, if it does, is the particular class to which the plaintiffs belong, nonunion workers and their employers, one which falls within the statute's protective ambit? We answer both these questions in the affirmative.

[9] There is no allegation that the defendants in this case were motivated by an invidiously discriminatory racial animus, and there is no evidence that would support such an allegation. Indeed, the theory of the plaintiffs' case is that they are the victims of a conspiracy motivated by the defendants' hostility toward nonunion workers of any race and the employers who hire them. We must, therefore, answer the question specifically reserved by *Griffin* and still unanswered in this circuit: does section 1985(3) reach conspiracies founded upon discriminatory animus directed against classes defined by some characteristic other than race?

Griffin noted that not all private conspiracies to interfere with the rights of another would come under the protective umbrella of section 1985(3). The Court determined the congressional purpose was to include only those conspiracies animated by an "invidiously discriminatory motivation."

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or *perhaps otherwise class-based*, invidiously, discriminatory animus behind the conspirators' action.

403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d at 348 (some emphasis supplied). Thus, *Griffin* expressly left open the possibility that a § 1985(3) cause of action existed against private conspiracies inspired by some nonracial class bias.

Encouraged by this suggestion, numerous lower courts have already found that section 1985(3) is not limited to protecting classes defined by race. Indeed, we are aware of no post-*Griffin* decision by a circuit court that has limited the scope of the statute to racially-motivated conspiracies. See cases cited *infra* slip op. at ——— – ———, at pp. ——— – ———.

Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme court's approach to other Reconstruction civil rights statutes in recent years "to 'accord [them] a sweep as broad as [their] language.'" *Griffin v. Breckenridge*, 403 U.S. at 97, 91 S.Ct. at 1796, 29 L.Ed.2d at 345. The expansive language of the statute could reach all conspiracies which deprive any class of persons of equal protection of the laws, not just those animated by racial discrimination. Sections 1981 and 1982, for example, both contain specific references to race, and the courts have consistently limited their application to instances of racial discrimination. *See, e. g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (§ 1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (§ 1982); *Olivares v. Martin*, 555 F.2d 1192 (5th Cir. 1977) (§ 1981). By contrast, however, section 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. *See, e. g., Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (prisoners); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978) (debtors attacking state pre-judgment attachment procedure); *Morris v. Michigan State Bd. of Education*, 472 F.2d 1207 (6th Cir. 1973) (sex).

Since section 1985(3), like section 1983, is not cast in racial terms, consistency demands that section 1985(3) also be read to protect nonracial classes.

The conclusion that section 1985(3) is not restricted to protecting victims of racial discrimination is also fully supported by the legislative history surrounding the statute's enactment. Both the congressional debates and the original statute's popular title suggest that the protection of groups who were being terrorized by the Ku Klux Klan (blacks and white Union sympathizers) was the Act's primary objective. Although concern for those persons victimized by Klan violence was the most pressing matter leading to adoption of the Act, both proponents and opponents of the legislation understood that it would cover other groups as well. Representative Hoar described the purpose of section 1985(3) as guaranteeing "that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights." Cong. Globe, 42d Cong., 1st Sess. 335 (1871). Senator Edmunds' famous remarks also aptly illustrate the congressional attitude toward what classes would enjoy section 1985(3)'s protection:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one [from] getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

Cong. Globe, 42d Cong., 1st Sess. 567 (1871). The congressional debates, which reflect a concern for all groups subjected to the Klan's organized lawlessness, make it appear that the statute's drafters intended to protect groups other than southern blacks.

Griffin, the statutory text, companion civil rights provisions, and the legislative history all indicate that a conspiracy motivated by invidiously discriminatory intent other than racial bias is actionable under section 1985(3).

However, the conclusion that section 1985(3) protects nonracial classes resolves only a part of the problem presented by this case, for we must also determine whether the particular class involved here is one which is covered by the statute's protective cloak.

[10] Precisely what kinds of nonracial classes enjoy section 1985(3)'s protection is far from clear. *Griffin* presented conduct "so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute" if it did not. 403 U.S. at 103, 91 S.Ct. at 1799, 29 L.Ed.2d at 348. At the same time, the Court's expressed concern over the broad reach of the statute's literal language dictates the exercise of restraint in defining what nonracial class-based discrimination is covered. Thus, we expressly limit our holding to a determination that section 1985(3) encompasses a private conspiracy against nonunion laborers and their employer. Appropriate development of judicial precedent demands that further delineation of the statute's outer limits must await specific cases.

[11] Not every conceivable class of persons is covered by the statute. Members of the plaintiff class must share some common characteristic beyond simply being victims of the defendant's conspiratorial conduct. *See, e. g., Askew v. Bloemker*, 548 F.2d 673 (7th Cir. 1976) (homeowners raided by drug enforcement agents); *Harrison v. Brooks*, 519 F.2d 1358 (1st Cir. 1975) (property owners allegedly injured by city council rezoning efforts). The class cannot be so large and amorphous that its members are virtually indistinguishable from the vast majority of the populace. *See, e. g., Blevins v. Ford*, 572 F.2d 1336 (9th Cir. 1978) (nonlawyers). Even some clearly defined and easily identifiable groups have been denied protected status under the statute. *See, e. g., DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals); *Curchman v. Korman Corp.*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898, 100 S.Ct. 205, 62 L.Ed.2d 133 (1979) (tenant organizers); *Lessman v. McCormick*, 591 F.2d 605 (10th Cir. 1979) (debtors); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) (persons who file voluntary bankruptcy petitions); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592 (1973) (physicians who testify in malpractice suits).

In the absence of Supreme Court guidance as to the kinds of classes protected by section 1985(3) or a method by which protected classes should be identified, our own en banc decision in *McLellan* provides our gauge. In *McLellan*, we held that the statute does not cover persons who file voluntary petitions in bankruptcy. The decision was based on three factors. First, the legislative history of the Ku Klux Klan Act contains no evidence of congressional concern about discrimination against persons who become insolvent. Second, while the protection afforded by the civil rights acts is not static, it would be inappropriate to enlarge the group of protected classes to include bankrupts when Congress had specifically declined to prohibit discrimination against them. Third, including bankrupts within the ambit of section 1985(3) would be unwarranted in light of the Supreme Court's refusal to characterize the right to file a bankruptcy petition as a fundamental right. 545 F.2d at 932–33.

[12] Applying the *McLellan* factors to our case today, we find that the plaintiffs constitute a class for § 1985(3) purposes.[8] The labor union movement in America was yet to be born when the 42d Congress was in session, so it could not have been specifically concerned with discrimination perpetrated against nonunion laborers. However, the congressional debates evince a hearty regard for persons who are victimized because of their political beliefs and associations. Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a political one. The motives and ambitions of the Klan disturbed the Republicans in the 42d Congress because they feared that its activities would defeat the policies of Reconstruction and deprive the newly emancipated blacks of rights secured to them under the recent amendments to the Constitution. Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath,

8. Our reliance upon the factors deemed relevant in *McLellan* does not necessarily imply that they are the only relevant considerations. Conceivably, other factors may be regarded as sufficient to include or to exclude other classes from § 1985(3) coverage.

> showing that here is a political organization, with political ends, political aims; it shows that the object and intent of that political organization is to prevent large masses of the people of the southern States from enjoying a right which has been guaranteed to them by the Constitution of our country.

Cong. Globe, 42d Cong., 1st Sess. 153 (1971). The Klan's political objective formed a recurrent theme in the Senate debates.[9]

The apprehension of Republican senators over the Klan's scheme of terrorizing citizens for their political views and of preventing voters from exercising their franchise also echoed throughout the debates conducted in the House. Representative Ellis Roberts of New York expressed this concern in the following terms:

> But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white; they include those who wore the blue and those who wore the gray; newcomers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction and of hostility to the national Administration and the destroying angel passes by. Omit that sign and the torch may kindle the roof that covers women and children.... Such uniformity of result can come only from design. Republicans only are beaten and mutilated and murdered, because the blows are aimed at Republicans only.

Cong. Globe, 42d Cong., 1st Sess. 412–13 (1871). Other Republican congressman expressed similar views.[10] *See generally* Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 Univ.Chi.L.Rev. 402, 407–420 (1979).

Thus, whereas *McLellan* could locate no indication of congressional purpose to protect persons discriminated against for filing bankruptcy petitions, the legislative history reflects a pervasive concern for persons conspired against for their political associations. The congressional debates surrounding adoption of the Act therefore provide support for including within the ambit of section 1985(3) those such as the plaintiffs who are punished because of their associations.

Similarly, enlarging the scope of the statute to include nonunion workers who are attacked for their choice to associate with other nonunion workers, thereby enabling an employer to offer significant work to the class, is appropriate in light of subsequently enacted federal legislation. While Congress has specifically refused to prohibit discrimination against bankrupts in legislation it has enacted on the subject, it has manifested a desire to

9. *See, e. g.*, Cong. Globe, 42d Cong., 1st Sess. 252 (remarks of Sen. Morton) ("[t]he purpose [of the Klan] is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee the State."); *id.* at 504 (remarks of Sen. Pratt) (the primary purpose of the Klan "is to punish men for their political opinions"); *id.* at 702 (remarks of Sen. Edmunds) (the "systematic plan [of the Klan] is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter").

10. *See, e. g.*, Cong. Globe, 42d Cong., 1st Sess. 72 (remarks of Rep. Blair) (the Klansmen "murder for a difference in political opinions") *id.* at 333 (remarks of Rep. Hoar) (the Klan is a "secret political conspiracy"); *id.* at 391 (remarks of Rep. Elliott) ("the design of the Ku Klux is political"); *id.* at 488 (remarks of Rep. Lansing) ("the Ku Klux in their crimes are inspired by political zeal").

protect laborers who opt not to affiliate themselves with a labor organization. Section 7 of the original Wagner Act provided that

> [e]mployees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Wagner Act, § 7, 49 Stat. 452 (1935). When Congress passed the original Act, it rejected the argument that parity required granting protection against coercive tactics of labor organizations as well as against those committed by employers. *See* S.Rep. 573, 74th Cong., 1st Sess. 16 (1935).

However, significant change was not long in coming. The 1947 Taft-Hartley amendments to the National Labor Relations Act brought the addition of unfair labor practices by labor organizations. The Taft-Hartley Act retained the right to form, join, or assist labor organizations, but it revised section 7 of the original Act so it would contain "the right to refrain from any or all such activities." Taft-Hartley Act, § 101, 61 Stat. 140 (1947), currently codified at 29 U.S.C. § 157. Section 8(b)(1) now declares it to be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed by section 7. 29 U.S.C. § 158(b)(1). Congress has thereby underscored the importance of the right of free association in the labor relations context and has guaranteed the right to a free and untrammeled choice to associate or not to associate with a labor organization. This manifestation of congressional concern for those in plaintiffs' class makes their protection by section 1985(3) particularly appropriate.

Finally, *McLellan* regarded the Supreme Court's refusal to call the right to file a bankruptcy petition a fundamental right as relevant to its own determination that bankrupts are not protected by section 1985(3). By contrast, the Supreme Court has characterized the right of free association as "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236 (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change." *Gilmore v. City of Mobile*, 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321 (1974). The importance of the freedom of association has led the court to call it one of the "indispensable liberties," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks "among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values. Thus, the difference in importance assigned to the right to file a bankruptcy petition and the right of the individual to freely associate with others of his own choosing favors protecting these plaintiffs.

Our determination that the plaintiffs constitute a protected class under section 1985(3) also comports favorably with the construction of the statute given by other courts. The lower federal courts have accorded § 1985(3) protection to two broad categories of nonracial classes. The first category consists of classes whose members are identified with one

another by some inherited or immutable physical trait or by a history of past discrimination. See, e. g., *Life Insurance Company of North America*, 591 F.2d 199 (9th Cir. 1979) (women); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) (Jews); *Baer v. Baer*, 450 F.Supp. 481 (N.D.Cal.1978) (members of the Unification Church); *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C.1973) (Children of God). Women, ethnic minorities, and religious sects are usually included under the statute because they are classes whose members bear no responsibility for their distinctive characteristics or because membership in the class has traditionally inflamed the irrational fears and hatreds of the majority.[11] Thus, they may be regarded as one of the groups which "require and warrant special federal assistance in protecting their civil rights." *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d at 332–33. The plaintiffs cannot claim they are distinguished from other persons by some immutable or inherited physical trait, like race or gender, over which they have no control.

However, courts have also granted protection to classes whose members are discriminated against because of their political beliefs or their associations. *See, e. g., Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (supporters of a particular political candidate); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of incumbent sheriff); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (worshipers at a predominantly white Catholic church disrupted by black civil rights protesters). It is within this second category of classes that plaintiffs fall.

Plaintiffs were denied the equal protection of law because they did not belong to a labor organization or worked for an employer which did not have a collective bargaining agreement and which hired workers without regard to their union membership. One of the unidentified co-conspirators made it clear to the plaintiffs before the destruction began that Port Arthur was a "union town." The plaintiffs were attacked and beaten and property was destroyed because they chose to exercise their right not to join a labor organization and to work with others of the same mind. In view of the foregoing considerations, we hold that the plaintiffs belong to a class protected by section 1985(3).

[13] Our decision does not imply that every union-nonunion controversy can create a section 1985(3) cause of action. Neither does it imply that every instance of violence arising in the context of a labor dispute will necessarily do so. Powerful limitations exist to restrict an overly broad application of the statute. *See generally McLellan*, 545 F.2d at 940–41 (Godbold, J., dissenting). Section 1985(3) cannot be invoked to disrupt the opera-

11. With respect to women, the Third Circuit has said that "[t]he fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality" is sufficient to warrant treating gender as a characteristic comparable to race. *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235, 1243 (3d Cir. 1978), *rev'd on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). Similar treatment of religious minorities can be justified because they often provoke the "fear, hatred and irrationality of the majority." *Baer v. Baer*, 450 F.Supp. 481, 491 (N.D.Cal.1978).

tion of a carefully integrated statutory scheme. *See Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (holding that deprivation of a right created by Title VII cannot form the basis for § 1985(3) cause of action). Neither can a § 1985(3) cause of action be predicated upon a simple unfair labor practice. *Cf. United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974) (holding an unfair labor practice not cognizable under 18 U.S.C. § 241, the criminal analogue to section 1985(3)). Unionism or nonunionism in and of itself does not create a covered class. But where, as here, there is no campaign to organize employees and force or violence is used to deprive nonunion workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.[12]

IV. THE CONSTITUTIONAL QUESTION: THE SOURCE OF CONGRESSIONAL POWER

[14] Having determined that section 1985(3) was intended to provide a civil remedy for the kind of conspiracy involved here, we must respond to defendants' argument that Congress lacks the constitutional power to enact legislation of this breadth. The plaintiffs maintain that section 5 of the Fourteenth Amendment authorizes Congress to provide a civil remedy for this private conspiracy. On the particular facts before us, we hold that the Commerce Clause empowers Congress to reach defendants' conduct and do not reach the Fourteenth Amendment issue.

Griffin emphasized that it was unnecessary to test the constitutionality of section 1985(3) in all conceivable applications in order to sustain its facial constitutionality and its application to the facts of any particular case. 403 U.S. at 105, 91 S.Ct. at 1799, 29 L.Ed.2d at 350. *Griffin* also makes clear that section 1985(3) is not unconstitutional merely because it reaches wholly private conspiracies. By the same token, it indicates that a source of congressional power must be identified to warrant application of the statute in each case.

12. It should be observed that the National Labor Relations Board has a long-established policy against awarding monetary damages for physical injury and property damage caused by strike or picket line violence for which the union is held responsible. *See Union de Tronquistas Local 901 (Lock Joint Pipe & Co.)*, 202 N.L.R.B. 399 (1973); R. Gorman, Basic Text on Labor Law 217 (1976); D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 99-100 (1976). The Board's refusal to give damage awards is predicated in part upon its view that such awards would unduly interfere with the policy of the National Labor Relations Act to protect concerted activities and that other remedies against union violence are sufficient deterrent. *Union de Tronquistas*, 202 N.L.R.B. at 400. Its practice is also grounded in concern for the proper institutional role to be played by the Board. *See District 1199, National Union of Hospital and Health Care Employees (Frances Scherver Home and Hospital)*, 345 N.L.R.B. 105 (1979) (Board is not equipped to handle personal injury claims); *Union Nacional de Trabajadores*, 219 N.L.R.B. 157 (1975) (awards are punitive and, therefore, not part of the Board's statutory function).

Whatever the basis for the Board's refusal to order compensation for injuries suffered during strike or picket line violence, our decision that section 1985(3) affords a remedy in this case does not offend that policy. In this case, no lawful concerted activity was taking place when the Cross construction site was attacked. There was no organizational campaign, no union demand for recognition, no informational picket, and no collective bargaining in progress. In such circumstances, a civil remedy for damages presents no danger of thwarting the Board's policy. However, whether section 1985(3) should also extend to other conspiracies against nonunion workers and their employers is a question which we expressly pretermit.

The *Griffin* court concluded that the Thirteenth Amendment and the constitutional right to interstate travel authorized Congress to reach the private conspiracy alleged there. But the court concluded its opinion, stating

> In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.

Id. at 107, 91 S.Ct. at 1801, 29 L.Ed.2d at 351.

The plaintiffs' § 1985(3) action cannot be sustained under the Thirteenth Amendment, for they are neither a racially oppressed group nor suffering in the bonds of involuntary servitude. *See, e. g., Jones v. Mayer*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Clyatt v. United States*, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726 (1905). Neither can it be supported by the right to travel on the present record. Although the plaintiffs alleged that the object of the defendants' conspiracy was to deprive them of the right to interstate travel, they have introduced no evidence to show that either the purpose or the result of the conspirators' acts was to infringe upon their right to such travel.

However, the alternative path suggested by *Griffin* is itself fraught with uncertainty. A major controversy still exists over the extent to which section 5 of the Fourteenth Amendment grants Congress the power to reach wholly private conduct. Particularly, whether section 1985(3) can be constitutionally applied to private, nonracially motivated conspiracies is a question which has divided the circuits. *Compare Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) *and Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (holding that the Fourteenth Amendment authorizes Congress to reach purely private conduct) *with Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976) (finding that it does not). Furthermore, no single interpretation of the expanse of Congress's power under section 5 has consistently commanded the adherence of a majority of the Supreme Court. *Compare United States v. Guest*, 383 U.S. 745, 762, 86 S.Ct. 1170, 1180, 16 L.Ed.2d 239, 251 (1966) (Clark, J., concurring, joined by Black and Fortas, JJ.) *and id.* at 782, 86 S.Ct. at 1190, 16 L.Ed.2d at 263 (Brennan, J., concurring and dissenting, joined by Warren, C.J. and Douglas, J.) (suggesting that § 5 empowers Congress to punish purely private conspiracies to deprive Fourteenth Amendment rights), *with, id.* at 753–60, 86 S.Ct. at 1175–80, 16 L.Ed.2d at 246–250 (opinion of the Court by Stewart, J., relying on right to interstate travel) *and id.* at 762, 86 S.Ct. at 1180, 16 L.Ed.2d at 251, (Harlan, J., concurring and dissenting). *See Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

We need not depend on this uncertain precedent for congressional power. *Griffin* clearly contemplated that other sources of congressional power might be available to justify other applications of section 1985(3). Indeed, the original proponents of the Ku Klux Klan Act did not base their assertion of congressional power exclusively on the Fourteenth Amendment. *See, e. g.*, Cong.Globe, 42d Cong., 1st Sess. 81 (1871) (remarks of Rep. Bingham) ("It was always competent for the Congress of the United States by law to enforce every affirmative grant of power . . . ."); *id.* at 477–78 remarks of Rep.

Shellabarger (referring to the amendment to § 2 "so far as it is not confined to infractions of rights which are clearly independent of the Fourteenth Amendment, referable to and sustained by the old provisions of the Constitution"). On the facts presented in this case, Congress has the authority to reach a wholly private conspiracy under the commerce power conferred by article I, section 8 of the Constitution.

A.A. Cross Construction Company is a general contractor in the building and construction industry. The record indicates that during the year preceding the violent episode of January 17, 1975, Cross had performed work outside of Texas valued in excess of $300,000. During that same period, Cross purchased goods and materials which originated outside of Texas, were used in its operations within Texas, and were valued at more than $50,000. In addition, at the time of the attack on the Alligator Bayou construction site, Cross was performing its obligations under a contract with the United States Army Corps of Engineers.

[15] Article I, section 8, clause 3 of the Constitution confers upon Congress the power "[t]o regulate Commerce . . . among the several states" and clause 18 of the same article grants it the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ." As the Supreme Court has pointed out, this grant of power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805, 811 (1949). *See United States v. Darby*, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, 619 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893, 911 (1937). . Moreover, that the volume of goods and supplies purchased by Cross or that the volume of business done outside of Texas is comparatively small in terms of the total amount of goods moved or work performed in interstate commerce is not significant. *Katzenbach v. McClung*, 379 U.S. 294, 300–01, 85 S.Ct. 377, 382, 13 L.Ed.2d 290, 291 (1964); *Wickard v. Filburn*, 317 U.S. 111, 127–28, 63 S.Ct. 82, 90, 87 L.Ed. 122, 136 (1942). Judicial inquiry is limited to asking whether Congress had "a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce. . . ." *Katzenbach v. McClung*, 379 U.S. at 304, 85 S.Ct. at 377, 13 L.Ed.2d at 298. And it is not constitutionally relevant that Congress was actually "legislating against moral wrongs" when it enacted the provisions in question. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257, 85 S.Ct. 348, 357, 13 L.Ed.2d 258, 268 (1946). Chief Justice Marshall's classic formulation of the extent of congressional power is still viable.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579, 605 (1819).

By these standards, Congress acted within its constitutional power when it enacted section 1985(3) to reach the private conspiracy involved here. It cannot be denied that the aim of protecting interstate commerce from undue burdens is a legitimate end. Congress could reasonably have determined that violent attacks and vandalism perpetrated on the workers of a construction firm engaged in interstate commerce would have a disruptive effect on the flow of products and services among the states. It is also beyond dispute that the aim of protecting interstate workers in the exercise of their First Amendment associational freedoms is a legitimate end. The means adopted for the accomplishment of these ends, a private civil remedy for damages, is plainly reasonable and appropriate. Section 1985(3) as applied to the facts before us is not prohibited by the Constitution and is compatible with both its letter and its spirit. Whether section 1985(3) can constitutionally be applied to other kinds of wholly private conspiracies to deprive persons of their civil rights is a question for another day.

V. THE EVIDENTIARY QUESTION: STANDARD OF PROOF AND SUFFICIENCY OF EVIDENCE

A. *The Standard of Proof*

[16, 17] The unions contend that they cannot be held liable for unlawful acts committed at the Cross construction site by some individual members of their organizations without "clear proof" that they actually participated in the unlawful conduct, gave prior authorization of it, or ratified the acts after actual knowledge of their commission. This more rigorous standard of proof derives from section 6 of the Norris-LaGuardia Act which provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106. This statutory standard of proof thus lies somewhere between the traditional burdens of reasonable doubt and preponderance of the evidence. With it, Congress intended to require "clear, unequivocal, and convincing proof" of union involvement in unlawful conduct to impose liability for it. *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1145, 16 L.Ed.2d 218, 234 (1966). Yet, while section 106 requires clear and convincing evidence as to union authorization, participation in, or ratification of the acts allegedly performed by its members, it does not prescribe a different standard of proof for other issues in actions against a union or its officers or members involved in a labor dispute. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).

The unions also recognize that section 106 is by its own terms limited to cases in which the union is participating or interested in a labor dispute. The Norris-LaGuardia Act defines a "labor dispute" to encompass

> any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the

disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c). The unions insist that the literal language of section 113(c) squarely covers the conduct at issue here. The persons who planned and executed the attack on the Alligator Bayou construction site were motivated by their resentment of Cross's employment practices and hostility toward its nonunion workers. Because the conspiracy that generated the case was formed around this nonunion animus, the defendants maintain that the controversy out of which this case arose cannot be anything other than a labor dispute.

[18, 19] This approach has a certain superficial appeal. Doubtless the attack on the Cross construction site was conceived in reprisal for the refusal of Cross and his workers to accede to demands that the Alligator Pumping Station project be conducted as a union job. Nevertheless, in construing any congressional enactment it is necessary to interpret the meaning of the words as they are used in relation to the setting in which they were written, with due regard to the mischief which the legislation was designed to remedy. In that light, these unions were not participating in a "labor dispute" as that language is employed in section 113(c) because their activity does not fall within the abuses that Congress intended to prevent.

The Norris-LaGuardia Act was passed in a particular social economic, and legal milieu. During the early part of this century, federal injunctive powers were often invoked to check the spread of union organization and collective bargaining. But Congress conceived that the courts were being made to play a partisan role in labor-management conflicts, in part because judicial injunctive relief usually did nothing to resolve the underlying industrial dispute. The Norris-LaGuardia Act was intended to curb this unwarranted judicial interference in the struggle between employers and employees. Instead, Congress decided to allow such controversies to be settled through negotiation and through the free play of economic forces.

> The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Rd., 353 U.S. 30, 39, 77 S.Ct. 635, 640, 1 L.Ed.2d 622, 628 (1957). Thus, the policy section of the Act stresses the worker's "freedom of association, self-organization, and designation of representatives of his own choosing" as indispensable to the private settlement of these disputes. 29 U.S.C. § 102. Congress thereby made the use of legitimate economic weapons—the picket, the strike, the boycott—part of the warp and woof of our national labor relations policy. *See generally Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250–51, 90 S.Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 100–03, 61 S.Ct. 122, 127–28, 85 L.Ed. 63, 68–70 (1940); A. Cox, D. Bok, & R. Gorman, Labor Law 60–64 (8th ed. 1977).

One of the special abuses identified by Congress was the use of vicarious liability doctrines under which the misconduct of a few individuals could be attributed to the labor organization that sponsored a strike or picket line. Courts had applied

the common law of conspiracy to hold unions responsible not only for the conduct of their authorized agents, but also "for every act committed by any member of a union merely because he was a member, or because he had some relation in the union although not authorized by virtue of his position to act for the union in what he did." *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395, 419, 67 S.Ct. 775, 788, 91 L.Ed. 973, 991 (1947) (Frankfurter, J., dissenting).

This conspiracy approach to union responsibility could frustrate the labor relations policy chosen by Congress. Imposing liability on the union for the unauthorized lawlessness of its more improvident members would penalize the union lawfully engaged in using the legitimate economic weapons thought necessary for the proper resolution of labor-management conflicts. Therefore, Congress enacted section 106, requiring clear proof of union participation in, authorization, or ratification of unlawful conduct before liability could attach.

However, there is no danger of frustrating the congressional policy favoring collective bargaining and no risk of punishing union engagement in protected activity in the case before us. When the events giving rise to this case occurred, no union had a collective bargaining agreement with Cross, and none was seeking recognition as the collective bargaining representative for Cross's workers. No solicitation or other organizational efforts were in progress to attain representation of the Cross employees. No labor organization was staging an informational picket to publicize Cross's employment practices. In short, there were no legitimate union activities taking place when the Alligator Bayou construction project was attacked. Here, some irresponsible individuals sympathetic to the cause of organized labor in Port Arthur, Texas, simply decided to make the Cross construction project an example for other unorganized companies and nonunion workers in the community. This is not the kind of controversy contemplated by Congress when it required "clear proof" of misconduct by a union "participating or interested in a labor dispute."

[20] On the other hand, a labor dispute does exist where unlawful conduct occurs in conjunction with some legitimate union activity. *See, e. g., Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers Int'l Union*, 362 F.2d 322, 327–28 (5th Cir. 1966). A labor dispute may also exist even though the otherwise legitimate union conduct is unlawful under some other statutory scheme. *See, e. g., Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365, 370–71, 80 S.Ct. 779, 783–84, 4 L.Ed.2d 797, 801–802 (1960); *Order of R. R. Telegraphers v. Chicago & N. W. Ry.*, 362 U.S. 330, 339 n.15, 80 S.Ct. 761, 766 n.15, 4 L.Ed.2d 774, 781 n.15 (1960); *Milkwagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. at 103, 61 S.Ct. at 128, 85 L.Ed. at 70. But neither situation is present here. Our holding, therefore, is necessarily a very narrow one: where a labor organization is accused of engaging in unlawful activity not associated with any on-going legitimate union conduct, the union is not participating in a labor dispute within the meaning of 29 U.S.C. § 113(c). Therefore, since the violence at the Alligator Bayou construction site did not occur in conjunction with a labor dispute, the clear-proof standard of section 106 is not applicable.

B. *Sufficiency of the Evidence*

[21] The unions finally urge that the evidence adduced at trial is insufficient

to support the judgment against them under any standard of proof. After carefully reviewing the entire record, we agree that the evidence does not warrant the district court's finding of involvement in the conspiracy for many of the unions vouched in judgment. However, as to the remaining unions, we cannot say that the factual conclusions reached by the district court are clearly erroneous.

[22] The factual findings made and the inferences drawn by the district court "come here well armed with the buckler and shield" of the clearly erroneous rule embodied in Federal Rule of Civil Procedure 52(a). *Horton v. U. S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 765 (1948). The appellate court must be especially reluctant to disregard a factual finding based upon the evaluation of testimony that draws credibility into question, *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537-38, 93 L.Ed. 672, 676 (1949); it may not consider the evidence anew, *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129, 151 (1969); and merely because it might have reached a different result on the same evidence will not justify its setting the district court's findings aside. *United States v. National Ass'n of Real Estate Bds*, 339 U.S. 485, 495-96, 70 S.Ct. 711, 717, 94 L.Ed. 1007, 1016 (1950).

The court below concluded that the assault on the Alligator Bayou construction site "evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 19[illegible], wherein a 'citizen protest' was discussed and a time and place were chosen for such a protest." 461 F.Supp. at 226. However, the evidence in the record does not support this inference. There was nothing unique about the January 15 congregation; it was the Council's regularly scheduled weekly meeting. The minutes of the meeting contain only one cryptic entry which might conceivably be construed to refer to the Cross construction site protest, and it is wholly innocuous.[13] In addition, those union representatives who actually attended the meeting testified that the committee discussed the Cross project and that some members mentioned they had heard of a demonstration to be held on the jobsite the following Friday. The import of their testimony is that the protest had already been conceived several weeks before January 15 and that neither the time nor the place for it were set by the Council. Furthermore, there is no evidence that the Council endorsed the planned protest: no motions were offered and no formal resolutions were adopted. The only connection between the Wednesday meeting and the Friday violence is the nearness in time between the two events. Given the regular sequence of such weekly meetings, this link is too tenuous. As to those unions against which the only evidentiary link is their participation in the January 15 meeting of the Sabine Area Building and Construction Trades Council, the judgment of the district court must be reversed.

13. The minutes show that the "good and welfare" of the community were discussed.

An additional fact casts the district court's error into even sharper relief. The court exonerated two unions as to which the only evidence of involvement was their representation at the January 15 meeting, yet it held other unions liable even though the proof against them was no stronger. Furthermore, the district court held the Operating Engineers, Local 450, liable, and that organization neither belonged to the Building and Construction Trades Council nor attended its January 15 meeting nor was otherwise shown to be connected with the violence. The additional evidence relevant to the Operating Engineers is no more compelling. The judgment against the union of Operating Engineers, Local 450, must too be reversed.

However, the situation is different with respect to the United Brotherhood of Carpenters and Joiners of America, Local 610. In mid-summer of 1974, before construction began on the Alligator Bayou project, Cross received a visit in his Houston office from an official of the union. John Wallace, financial secretary and business representative for the Carpenters Local 610, gave Cross his business card and informed him that he wanted the union to furnish laborers for the job. He also asked Cross to sign a union contract. Cross agreed to hire members of Wallace's union but refused to enter into the proposed agreement. Wallace then told Cross that his refusal would "cost him a million dollars."

Wallace had no further contact with the Alligator Bayou project until January 17, 1975, when the attack occurred. On that day, Wallace was present at the highway near the access road which led to the Cross jobsite on at least two separate occasions. More damaging, however, is the fact that Wallace was also observed with Robert Faulk, subsequently identified as one of the principal participants in the violence committed that morning. The two men, riding in Wallace's pickup truck, drove part of the way down the road leading to the construction site, confirmed that the Cross workers had arrived at the scene, and returned to the highway. Shortly thereafter, the mob attacked Cross's workers. Wallace admitted that he was at the highway and that he and Faulk approached the construction site together. Not surprisingly, however, his version is less sinister. He also testified that he saw some members of Local 610 and that, before leaving the area, he expressly instructed them not to engage in any violence. From this evidence, the district court concluded that the union had actually participated in the conspiracy, and we cannot say that his factual inferences and credibility resolution are clearly erroneous. Therefore, the judgment against the United Brotherhood of Carpenters and Joiners, Local 610, is affirmed.

Similarly, we affirm the judgment against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 195. Bruce Hill, one of two business representatives for the Local, appeared at the Cross construction site shortly after the violence had ended. Fulton Johnson, the Corps of Engineers inspector assigned to the Alligator Bayou project, described Hill's conduct at the scene. He testified that Hill was laughing and joking and that his light-hearted demeanor and remarks were highly inappropriate for the gravity of the situation. While Johnson and a colleague were attempting to take photographs of the damage, Hill repeatedly interposed himself in front of the camera, urging him to take his photograph with a burning trailer behind him. Johnson re-

called that Hill sarcastically told them he wanted the photograph to post on the bulletin board at the local so that "he could show his men what not to do."

Hill himself gave a more innocent account of the episode, and denied saying that he wanted the picture for the union bulletin board. His explanation for seeking the photograph was, "I don't know. I guess I am a camera freak. I like to have my picture taken." Although the local's other business representative had attended the January 15 meeting of the Trades Council when the protest was discussed, Hill said he first learned of the events around 8:00 that Friday morning when he overheard some men talking at a grocery store. He stated that he went to the Cross construction site to check on a friend who worked nearby, even though he had never been there to see him before. Although the evidence is sparse, we cannot say that the district court's finding that the Pipefitters Local 195 was involved in the conspiracy is clearly erroneous.

Lastly, we also affirm the district court's finding as to the United Brotherhood of Carpenters and Joiners of America, Local 753. Jay Desormeaux and Curtis Beasley, members but not officers of Local 753, were both observed on the Cross construction site during the violent melee of January 17. Desormeaux recounted a conversation he had with Randy Wylie, assistant business agent for the local, on the preceding Wednesday or Thursday when they discussed the planned protest. Wylie admitted that Desormeaux had called him to ask about the demonstration but denied instructing him to go to the work site. Wylie also admitted seeing Desormeaux at the highway on the fateful Friday morning.

There was still more evidence suggesting that the union had authorized the unlawful conduct. Both Desormeaux and Beasley were named as defendants in this lawsuit. Beasley testified that, after the suit was commenced, Wylie had referred him to the union's own lawyers for representation in matters connected with his part in the violent events of January 17. Desormeaux also stated that he had spoken with both Wylie and W. H. Carr, business agent for Local 753, about obtaining a lawyer and expressed his belief that the union would pay his attorney fees. Carr informed Desormeaux that the union furnishing him with a lawyer would be "the least they could do," since he was a union member. However, Desormeaux knew of no formal arrangement by which the union regularly provided legal services to its members and conceded that the union had never done so for him. Wylie denied talking with Desormeaux about attorney fees, but, apart from that denial, the union made no effort to rebut this testimony. It did not deny furnishing legal services for its members in actions arising from the violence. The evidence in the record permitted the inference that the union sponsored the attack on the Cross employees and then undertook to lend assistance to its members who were discovered in the unlawful enterprise. The appellate issue is not whether we might have taken a different view had the evidence been presented initially to us. It is whether the district court's determination that the Carpenters Local 753 authorized or participated in the attack is clearly erroneous. It is not.

VI. CONCLUSION

In summary, we hold that (1) the anti-injunction provisions of the Norris-LaGuardia Act do not deprive the district

court of jurisdiction to enjoin violence, and (2) Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers and their employer of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. In addition, we hold that the Commerce Clause empowers Congress to reach the private conspiracy involved in the case before us. Furthermore, since this case does not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113(c), the clear-proof standard of 29 U.S.C. § 106 is inapplicable. We conclude that the district court's findings that the Carpenters Local 610, Pipefitters Local 195, and Carpenters Local 753 authorized or participated in this conspiracy were not clearly erroneous. Nevertheless, we find that the evidence of participation in the conspiracy is insufficient to warrant the district court's judgment against the remaining eight unions.

In light of the foregoing, the judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. TEXAS
BEAUMONT DIVISION

Civ. A. No. B-75-26-CA

PAUL E. SCOTT ET AL.,
Plaintiffs,

v.

BILL MOORE ET AL.,
Defendants.

Nov. 16, 1978

MEMORANDUM OPINION

JOE J. FISHER, Chief Judge.

This is a case in which the Plaintiffs, Paul E. Scott, James T. Matthews, and others, while in the employment of another Plaintiff in this suit, A.A. Cross Construction Co., Inc., were attacked and beaten while constructing a pump station known as the Alligator Bayou Pump Station on the hurricane levee along Taylor's Bayou, near Port Arthur, in Jefferson County, Texas.

The evidence reflects that the attack evolved from a meeting held by the Executive Committee of the Sabine Area Building and Construction Trades Council on January 15, 1975, wherein a "citizen protest" was discussed and a time and place were chosen for such protest. The purpose of this demonstration was to voice concern over Cross Construction Company, Inc.'s bringing "outside" nonunion workers into a "union area." In addition, the evidence shows that the Plaintiffs were informed by several Defendants that if the Plaintiff, Cross Construction Co., Inc., continued to hire nonunion personnel for

the work to be performed on the Alligator Bayou Station, there would be "serious trouble."

Unions represented and individuals present at the January 15, 1975 meeting included:

Walter Flowers, Laborers Local #870
H. H. Silkwood, Cement Masons Local #884
Pete Ellis, Pipefitters Local #195
Randy Wylie, Carpenters Local #753
John D. Wallace, Jr., Carpenters Local #610
W. H. Carr, Carpenters Local #753
J. L. St. Clair, Painters Local #243
Jesse Martin, Boilermakers Local #277
J. C. Vaughn, Boilermakers Local #587
L. P. Vaught, Ironworkers Local #125
A. B. Wheeler, Carpenters District Council of Sabine Area

Pete Bean, Sheet Metal Workers Local #198
Walter Keneson, I.B.E.W. Local #479

Thereafter, on January 17, 1975, a large group of individuals, including union members present at the January 15, 1975 meeting, amassed at the entrance to the Alligator Bayou Construction site. From this group, several truckloads of men emerged, drove onto the construction site, assaulted and beat the Plaintiffs, burned and destroyed the tools and equipment of Plaintiff, Cross Construction Co., Inc., and threatened to continue violent actions if the nonunion workers did not leave the area or concede to union policies and principles.

A suit was then filed pursuant to 42 U.S.C. 1985(3) with jurisdiction predicated upon 28 U.S.C. 1343 and 1331. Section 1985(3) states, in relevant part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privi-

> leges and immunities under the laws; . . . (and) in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

To come within the purview of 42 U.S.C. 1985(3), a complaint is required to allege four matters:

(1) the defendants must conspire

(2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and

(3) the defendants must act in furtherance of the object of the conspiracy, whereby

(4) one was (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

In addition, the *Griffin* Court interpreted the language requiring intent to deprive of equal protection or equal privileges and immunities, to mean that such intent must have at its foundation some racial or perhaps otherwise class-based invidiously discriminatory animus. However, the Supreme Court refrained from deciding whether a conspiracy motivated by such invidiously discriminatory intent, other than racial bias, would be actionable under Section 1985(3).

The *Griffin* decision demonstrated the Supreme Court's serious concern over the creation of a general federal tort law should Section 1985(3) be literally interpreted; and, as a result the Court stated,

> The Constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment (incorporated into the section) . . .
>
> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin, supra at 102, 91 S.Ct. at 1798.

The Seventh Circuit, in *Dombrowski v. Dowling*, 459 F.2d 190 at 195, in addressing the breadth of section 1985(3), found,

> The breadth of the statute's coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely, rights protected by the Fourteenth Amendment.

The problem now before us does not involve an allegation of racial discrimination, nor an interference with the right to travel interstate. Rather, this Court is required to determine whether the Plaintiffs have shown a "class-based, invidiously discriminatory animus behind

the conspirators' action." *Griffin v. Breckenridge*, supra. The central inquiry here is whether discrimination against employees of a non-union entity is the kind of invidiously discriminatory motivation of the Court envisioned in *Griffin*.

It is the opinion of this Court that the Plaintiffs in the instant case have set out and proven a Section 1985(3) cause of action for the reasons hereafter stated.

In regard to the first requirement delineated by the *Griffin* decision necessary to have a Section 1985(3) cause of action, this Court finds that the Plaintiffs have established, and the facts show the existence of, a conspiracy by the Defendants. Elements of a conspiracy, agreement and intent, may be and often must be shown by circumstantial evidence. *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). It is well established that one can be a party to a conspiracy even though he does not know of the existence or identity of all his co-conspirators, and even though he does not participate in all of their acts. Once the conspiracy exists, co-conspirators of whom a party to the conspiracy is unaware can bind him by their actions. *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971). It is not essential that each conspirator participate in all the activities of the conspirators in furtherance of the conspiracy or have knowledge of such activities. It is sufficient if the conspiracy is established and that the convicted persons knowingly contributed their efforts in furtherance of it. *McManaman v. United States*, 327 F.2d 21 (10th Cir. 1964). One who knowingly joins a conspiracy takes it as he finds it, with or without knowledge of what has gone on before. *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967). All co-conspirators are liable for acts done during the continuance of the conspiracy and in furtherance of some purpose of the conspiracy even though the acts may have occurred without the knowledge of one of the defendants. *El Ranco*,

Inc. v. First National Bank of Nevada, 406 F.2d 1205 (9th Cir. 1968).

The violence perpetrated upon the Plaintiffs meets the second requisite set out in *Griffin*, i. e. a conspiracy "for the purposes of depriving another of equal protection or equal privileges and immunities." The Fifth Circuit, in *McLellan v. Mississippi Power and Light Co.*, 545 F.2d 919 (1977), held that two elements must be present in order to satisfy *Griffin's* second requirement, namely, (1) the private deprivation of the enjoyment of the laws, and (2) a class-based, discriminatory motivation. In determining what a private deprivation of the enjoyment of legal rights entails, the Fifth Circuit found that the inquiry must initially concentrate on the legality of the defendants' activity apart from section 1985(3).

> If the object of the defendants' conspiracy did not include a violation of some law (independent of section 1985(3) itself) which protects the plaintiff, the conspiracy could not have deprived the plaintiff of the 'protection of the laws.' Put more simply, there can only be a deprivation of the rights of a plaintiff when the action of the defendants is *otherwise* illegal.

McLellan, supra at 924-925.

We find that the conspiracy in the instant case clearly encompassed violations of both the civil and criminal laws of Texas. In addition, we find that the defendants engaged in the unlawful conduct they conspired to commit. The January 15, 1975 meeting and the actions leading to the attack upon the Alligator Bayou Station, the assault of the nonunion construction workers, and the destruction of the tools and equipment of Cross Construction Co., Inc. constituted a conspiracy. Clearly, the Defendants in this case have conspired to act contrary to law and therefore, the second element of section 1985(3) has not been met. In this, there can be no denial.

As noted earlier, the Supreme Court's *Griffin* decision declined to address the question of "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under section 1985(3). Nevertheless, some lower courts have held that various private conspiracies are actionable under the statute. E. g. *Richardson v. Miller*, 446 F.2d 1247 (3rd Cir. 1971); *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc). The Fifth Circuit, in *McLellan*, declined to decide whether Congress intended that *only* racial bias would activate section 1985(3), although they did note that the Supreme Court's evident concern in *Griffin* over the broad literal sweep of the statute would dictate the exercise of restraint when a court is confronted with class-based discrimination grounded in a non-racial animus.

The requirement that there be some kind of class-based discriminatory animus behind the conspirator's actions presents the most difficult obstacle to a Plaintiff bringing a section 1985(3) action. To meet this requirement, the Plaintiffs contend that a conspiracy motivated by an invidiously discriminatory intent against non-union individuals and employers of these individuals is actionable under section 1985(3). To find for the plaintiffs, this Court must reach two separate conclusions. The Court must first decide whether the statute affords protection to classes drawn along lines other than race; and second, give an affirmative answer to the first, whether the Plaintiff's class—non-union laborers and the employer of those laborers—is a class within the ambit of Section 1985(3)'s protection.

This Court is persuaded that, while racial discrimination and the activities of the Ku Klux Klan were foremost on Congress' mind when it passed the Ku Klux Klan Act, the legislative branch sought to protect any individual of a discernable and definite class from discrimination and

violence directed toward him because of his membership in such class. From the Congressional Record, one can readily assume that section 1985(3) was intended to extend beyond racially based conspiracies and beyond the problems perceived to be pressing in 1871. Senator Edmunds, one of the proponents of a Bill which is now known as the Civil Rights Act of 1871 and which Section 1985(3) is based upon, remarked at a hearing on the issue,

> We do not undertake in this Bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.

42d Cong., 1st Sess. 567 (1871), reprinted in A. Avins, *The Reconstruction Amendments' Debates* 547 (1967).

Section 1981 and 1982 make specific reference to race and therefore have not been extended to non-racial discrimination, while section 1985(3) makes no such reference. In addition, the Sixth Circuit, in *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), ruled that a supporter of a candidate for sheriff could maintain a section 1985(3) action against individuals who had interferred with the Plaintiff's exercise of Federal rights. Thus, this Court concludes that Congress did not intend to limit the protection of section 1985(3) to racial discrimination only. On the other hand, this Court would warn that the statute is not to be a panacea for discrimination. Rather, section 1985(3) is plainly addressed to discrimination which has at its foundation a "racial or perhaps otherwise class based, invidiously discriminatory animus" and that dis-

criminatory animus must be directed towards a definite and discernable class.

It is, therefore, incumbent upon the Plaintiffs in the instant case to next establish that they are members of a definite class which is protected by this section.

As noted above, the animus requisite for an action under section 1985(3) must be directed against a group or class having common characteristics of an inherent nature, not a congeries of persons who become a "class" by virtue of the denial to them of some advantage or their involvement in a single common kind of action. The statute is not designed to embrace *any* conspiracy that is aimed at two or more people with a single common trait.

Section 1985(3), it seems to us, lends itself only to those situations where the injury is class motivated and the class animus alleged must be consistent with the deprivation of rights alleged. The creation of a class of victims by tortious conduct does not, of itself, bring a claim within section 1985(3). To succeed, a Plaintiff must show a conspiracy entered into with intent to deny the class to which he belongs equal protection of the law, or an injury for lawfully expressing the right of any person to equal protection of the law.

This Court finds the Plaintiffs have met this requisite, in that they are members of a discernable class, to wit: non-union laborers and employers of non-union laborers. Likewise, this Court believes that men and women have the right to associate or not to associate with any group or class of individuals, and concomitantly, to be free of violent acts against their bodies and property because of such association or non-association.

Moreover, it is obvious, in this Court's mind, that the acts of violence upon these individuals in this case are manifestations of the ill-will and hatred these union members harbor toward non-union individuals, as well as, an

attempt by the unions to intimidate and coerce these non-union people from working or being employed within a "union area". This Court is convinced that the violence evidenced in this case constitutes discrimination and that it makes no difference whether the lines are drawn between Black and White, Protestant and Catholic, or union and non-union. In each case, the need for protection is of equal persuasion.

Therefore, it is the opinion of this Court that the Plaintiffs have clearly established a section 1985(3) claim and are entitled to damages.

The damages in this case can be divided into two types —immediate and consequential damages. Immediate damages being those to property and person which arise from a single occurrence, such as the destruction of equipment which can be repaired or replaced. The consequential damages are those suffered by the Plaintiff contractor, his construction contract and his contractual relations.

This Court finds immediate damages as follows: To Plaintiffs Paul E. Scott and James T. Matthews, $5,000.00 each for injuries sustained during the attack on January 17, 1975. To Cross Construction Company, $10,314.00 for damage to and loss of construction equipment. This award does not include those monies paid by Cross's insurance company for the custom-made office shack, five tool shacks and numerous small tools which were destroyed by the Defendants.

The consequential damages embrace those additional costs for insurance coverage and guard service forced upon Cross Construction Company due to the January 17 attack. We find that the increased insurance costs directly caused by this attack totals $27,089.44. This figure, proven at the trial, can be broken down as follows:

C11

Increased Insurance Cost to Cross Construction

Worker's Compensation Experience Modification	$14,030.00
Worker's Compensation Dividend	9,992.00
Contractors Equipment Premium Increase	2,067.44
Contractors Equipment Deductible	1,000.00
	27,089.44

We also find that Plaintiff Cross Construction Company incurred $49,982.00 in additional expenses for a security service. Not only did the property insurers and worker's compensation insurers refuse to write further coverage absent full-time security guard protection, but Cross's employees and his suppliers refused to come upon the job-site absent protection.

In addition, this Court directs that the Defendants pay the Plaintiff's attorneys fees in the amount of $25,000.00.

The Court finds that the Defendants in this case are jointly and severally liable for the above damages.

All costs shall be paid by the Defendants. Counsel for Plaintiffs shall submit an appropriate judgment consistent with the verdict of the Court, to be entered within thirty (30) days from this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-75-26-CA

PAUL E. SCOTT, ET AL.,
Plaintiffs

VS.

BILL MOORE, ET AL.,
Defendants

FINAL JUDGMENT

Upon consideration of the pleadings, evidence, briefs, and oral argument of all parties herein by the Honorable Joe J. Fisher, Chief Judge, the Court's Memorandum Opinion was entered November 10, 1978. In accordance with the Court's Findings of Facts and Conclusions of Law, it is the Judgment of the Court and accordingly ORDERED, ADJUDGED and DECREED that:

1.

Paul E. Scott shall have and recover Five Thousand ($5,000.00) Dollars of and from defendants, Laborers International Union of North America, Local #870, Operative Plasterers and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental

Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

2.

James T. Matthews shall have and recover Five Thousand ($5,000.00) Dollars of and from defendants, Laborers International Union of North America, Local #870, Operative Plasters and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

3.

A. A. Cross Construction Co., Inc. shall have and recover One Hundred Twelve Thousand Three Hundred Eighty-Five and 14/100 ($112,385.14) Dollars of and from defendants, Laborers International Union of North America, Local #870, Operative Plasters and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpen-

ters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

4.

It is further ORDERED, ADJUDGED and DECREED that defendants, International Association of Heat and Frost Insulators and Asbestos Workers, Local #22, International Association of Heat and Frost Insulators and Asbestos Workers, Local #112, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, Bricklayers, Masons, and Plasters International Union, Local #13, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, United Brotherhood of Carpenters and Joiners of America, Local #2007, Operative Plasters and Cement Masons International Association, Local #884, Operative Plasters and Cement Masons International Association, Local #804, Wood, Wire and Metal Lathers International Union, Local #416, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #2484, International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450, International Brotherhood of Painters and Allied Trades, Local #328, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States

and Canada, Local #1347, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #504, International Brotherhood of Electrical Workers, Local #479, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Laborers International Union of North America, Local #852, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, Local #116, Sheet Metal Workers International Association, Local #196, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local #920, Laborers International Union of North America, Local #870, and Sabine Area Building Trades Council, and all persons, firms, and associations combining or conspiring with said defendants, and all persons having notice of this Order, are hereby permanently enjoined from and shall not hereafter combine, conspire, threaten, intimidate, assault, or commit any act of violence toward or upon any person, property or possession of any person or his family who may work upon, travel to, deliver materials, goods, or services to A. A. Cross Construction Co., Inc., or to the site of the Alligator Bayou Pump Station on Taylor's Bayou near Port Arthur, Jefferson County, Texas.

5.

All costs herein are assessed against the defendants, Laborers International Union of North America, Local #870, Operative Plasters and Cement Masons International Association, Local #884, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #195, United Brotherhood of Carpenters and Joiners of America, Local #610, United Brotherhood of Carpenters and Joiners of America, Local #753, International Broth-

erhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Local #587, International Association of Bridge Structural and Ornamental Ironworkers, Local #125, Sheet Metal Workers International Association, Local #196, Carpenters District Council of Sabine Area, International Brotherhood of Electrical Workers, Local #479, and International Union of Operating Engineers, Hoisting and Portable Engineers, AFL-CIO, Local #450.

DONE this 19th day of December, 1978.

/s/ Joe J. Fisher
JOE J. FISHER
Chief Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*
REVISED 6/4/82

No. 79-1196

D.C. Docket No. CA-B-75-26

PAUL E. SCOTT, ET AL.,
Plaintiffs-Appellees,
versus
BILL MOORE, ET AL.,
Defendants,

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL #870, ET AL.,
Defendants-Appellants,

INTERNATIONAL UNION OF OPERATING ENGINEERS, ETC., AFL-CIO, LOCAL 450,
Defendant-Appellant.

Appeal from the United States District Court
for the
Eastern District of Texas

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, WILLIAMS and GARWOOD, Circuit Judges.

---

* Former Fifth Circuit case, section 9(1) of Public Law 96-452, October 14, 1980.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc, with oral argument;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that the opinion entered by a panel of this Court on March 26, 1981, affirming in part and reversing in part the judgment of the said District Court in this cause be, and the same is hereby affirmed in part and reversed in part by the Court en banc.

IT IS FURTHER ORDERED that the defendants-appellants, Carpenters, Local 610, Pipefitters Local 195 and Carpenters Local 753, pay to the plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

July 1, 1982

RUBIN and WILLIAMS, Circuit Judges, with whom BROWN, VANCE, KRAVITCH, RANDALL, TATE and SAM D. JOHNSON, Circuit Judges, join, dissenting.

ANDERSON, Circuit Judge, dissenting.

GARWOOD, Circuit Judge, dissenting.

ISSUED AS MANDATE: